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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-835

T. J. CLARK, ETC., ET AL,

Petitioners

VS.

MARILYN WHATLEY AND CAROL GERBER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. _____

T. J. CLARK, ETC., ET AL,

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VS.

MARILYN WHATLEY AND CAROL GERBER,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Mark White, Jr., Secretary of State of Texas, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 3, 1973.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit affirming the Judgment of the District Court for the Eastern District of Texas is reprinted in the Appendix, infra, pp. 1A to 9A. The Memorandum Opinion and Order of the District Court for the Eastern District of Texas which was affirmed is reprinted in the Appendix, infra, pp. 10A to 18A A Petition for rehearing was denied by the Court of Appeals on August 29, 1973.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth District was entered on August 3, 1973. This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C., Section 1254(1) and (2).

QUESTIONS PRESENTED

1. May a State in regulating registration of voters for the purpose of insuring that only bona fide residents of a relevant political subdivision register there, require as one prerequisite for registration in the political subdivision where they are attending school that student voters make a showing that they intend to continue to make that political subdivision their home for an indefinite, but not permanent, period of time after graduation?

2a. Is a state empowered to regulate resident requirements for voting purposes of its own citizens who are qualified to vote within the state, for local county elections, if reasonable provisions are made for these same citizens to vote for (1) electors for President and Vice-President of the United States; and (2) all offices,

questions or propositions to be voted on by all electors throughout the state?

b. If the above is true, does the regulation of resident requirements by the State for voting purposes of those citizens who are qualified to vote within the state for local county elections present a substantial federal question?

These questions as presented are interrelated to such a degree that Arguments and Authorities in regard to each of these questions will be presented together.

STATEMENT OF THE NATURE OF THE CASE

The Complaint was brought by student-Plaintiffs from several different counties in Texas against the Tax Assessors-Collectors of the respective counties who are the voting registrars and the Secretary of the State of Texas. A constitituional challenge in the Complaint prayed that the Court find Article 5.08k of the Texas Election Code to be in violation of Plaintiffs' Equal Protection rights under the Fourteenth Amendment to the Constitution of the United States.

The Plaintiff-Respondents went to trial with only one witness, William Dennis Green, who had not been allowed to register to vote in Denton County, Texas. All of the other Plaintiffs had qualified and registered to vote in their respective counties and were not used as witnesses (which would indicate that Plaintiff Green could not adequately represent the class he claims to represent).

The last sentence in Article 5.08k which is specifically challenged, is a test to show proof of intent to the change of domicile or bona fide residency in Texas. Texas requires

that all Texas voters be bona fide residents of the county where they vote.

The District Court found that the State of Texas did not have a compelling state interest in setting strict safeguards and standards to prevent Texas students from moving from one county to another for the primary and temporary purpose of attending schools and registering to vote in local community elections, thus diluting the vote of local electors.

This Opinion was affirmed in the United States Court of Appeals for the Fifth Circuit.

Plaintiff Green's testimony stated that he came to school in Denton County, Texas from Dallas County, Texas about thirty (30) miles away where his home was with his parents. He answered that presently he was working in Dallas, Texas. Plaintiff Green was not allowed to register to vote when he answered questions by the voting registrar that he was a student and that he had no present intention one way or another where he was going to live after he graduated from school. He turned eighteen years of age after going to Denton from Dallas.

REASONS FOR GRANTING THE WRIT

1. *Wilson v. Symm*, 341 F.Supp 8 (S.D. Tex. 1972) was handed down on March 29, 1972, by Memorandum and Order which is reprinted in the Appendix, infra, pp. 19A to _____. Electing not to appeal, counsel filed this cause, *Whatley v. Clark*, _____ F.Supp. _____ in the Eastern District of Texas, 1972, which was handed down by Memorandum Opinion and Order on October 2, 1972,

(Appendix, pp. 1A to 9A), and reached a decision contrary to *Wilson*, supra. Immediately *Ballas v. Symm*, 351 F.Supp. 876 (S.D. Tex. 1972) was filed in the Southern District of Texas. An Opinion and Order was handed down on November 13, 1972 which was contrary to *Whatley*. The Opinion and Order is reprinted in the Appendix, infra, pp. ___A to ___A. (*BALLAS* is presently on appeal to the Court of Appeals for the Fifth Circuit). *Wilson* and *Ballas* found Article 5.08(k) of the Texas Election Code to be valid and constitutional. *Whatley* found Article 5.08(k) of the Texas Election Code to be invalid and unconstitutional. *Each of these three cases are not distinguishable in principle.*

2. The Opinions below wrongly based their holdings on the deposition testimony of Bob Bullock, a former Secretary of State of Texas, which caused the District Court to state in its Memorandum Opinion and Order (Appendix, infra, pp. 14A) that the Defendants (Petitioners) "in the instant case apparently rely on no compelling state interest". This deposition testimony of Bob Bullock was offered by the Plaintiff-Respondents and was objected to by Defendants-Petitioners as being personal opinion and conclusions of Bob Bullock. Most of the Bullock deposition was reprinted verbatim in the Memorandum Opinion and Order (Appendix, infra, pp. 14A to 18A).

3. It is of great importance and interest to the State of Texas that this Honorable Court grant the writ and review the findings and reasoning in the Opinions below and advise the State of Texas and other states that they can set up reasonable standards in law which will insure that only bona fide residents register to vote in a county and reiterate as in *Carrington v. Rash*, 380 U.S. 89, 96 (1965)

that the state is not precluded from establishing machinery for preserving the integrity of its lawful residency requirements.

ARGUMENTS AND AUTHORITIES

THE TEXAS ELECTION CODE WHEN READ TOGETHER OR IN PERTINENT PARTS REFLECTS AN INTENT TO PROMOTE A COMPELLING STATE INTEREST WITH THE DESIGN AND PURPOSE OF INSURING THAT ONLY BODA FIDE COUNTY RESIDENTS REGISTER FOR THE VOTE.

Respondent-Plaintiffs are not new residents in the State but are students already domiciled and eligible to vote in the county where they lived with their parents in Texas and moved to the new county for the temporary and primary purpose of attending school.

Pertinent parts of the Texas Election Code should be considered together.

Article 5.08(c). "A person shall not be considered to have lost his residence by leaving his home to go to another place for temporary purposes only."

Article 5.08(d). "A person shall not be considered to have gained a residence in any place to which he has come for temporary purposes only, without the intention of making such place his home."

Article 5.08(k). "The residence of a student in a school, college, or university shall be construed to be where his home was before he became such student unless he has

become a bona fide resident of the place where he is living while he is attending school or of some other place. A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student."

Article 1.01. Design of the Code. "The aim in adopting this Code is to state in plain language the laws governing the nomination and election of officers and of holding other elections, to simplify, clarify, and harmonize the existing laws in regard to parties, suffrage, nominations, and elections, and to safeguard the purity of the ballot box against error, fraud, mistake and corruption, to the end that the will of the people shall prevail and that true democracy shall not perish from the Lone Star State. To that end the provisions of this Code shall apply to all elections and primaries held in this State, except as otherwise provided herein."

Article 5.08(k) contains a rebuttable presumption that a student applicant's residence shall be construed to be where his home was before he became such a student. That portion of the Act was not stricken below.

In order for a student to change domicile from his prior home county with his parents to the county where he is attending school, in complying with Article 5.08(k), he must show that "he intends to remain there and to make that place his home indefinitely after he ceases to be a student, a test of his intention of changing domicile". "Indefinitely" as used means a present intent that could be changed at any time by circumstances.

In other words, he must demonstrate that his present intent is to make that place his home for some period after

he ceases to be a student. That is a test of his intent in order to change his domicile. Otherwise, his intent would be to remain in that place only for the temporary purpose of attending school. That being true, his domicile would remain in the county where he lived with his parents and he could utilize the provision of the Code which allows absentee balloting if he could not be at his home on election day. (The Opinion in *Ballas*, supra, discusses "indefinitely" at length.)

If a student does not qualify to change domicile to the county where he is attending school under provisions of 5.08(k), he does not lose his vote but must vote in his county of his domicile where his parents live.

AUTHORITIES

Carrington v. Rash, 380 U.S. 89 (1965), struck down the irrebbutable prohibition against military personnel establishing voting residency in Texas. However, in doing so, the Court said, "*By statute (citing Article 5.08) Texas deals with particular categories of citizens who, like soldiers, present specialized problems in determining residence. Students at colleges and universities in Texas, patients in hospitals and other institutions within the State, and civilian employees of the United States Government may be as transient as military personnel.* But all of them are given at least an opportunity to show the election officials that they are bona fide residence." 380 U.S. 95 (emphasis added).

These specialized problems in determining residency allows the State to require an added showing of intent on the part of the "particular categories of citizens", such as students moving from one county to another, in order to insure that only bona fide residents are allowed to vote.

Evans v. Corman, 398 U.S. 419 (1970), struck down an irrebbutable presumption of non-residency in Maryland which was condemned in *Carrington*. In affirming, the Supreme Court relied upon *Carrington*, but was careful to reiterate that a State is not precluded from establishing machinery for preserving the integrity of its lawful residency requirements:

> "Maryland may, of course, require that all applicants for the vote actually fulfill the requirements of bona fide residency. *Carrington v. Rash*, 380 U.S. 89, 96 (1965). *But if they are in fact residents, with the intention of making (the State) their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation.*" 398 U.S. at 421. *Carrington*, Id. at 94 (emphasis added).

The State of Texas makes the same requirements of students, allowed above, in Article 5.08(k), Texas Election Code, which is under attack in this cause. This is a condition which requires the expression of a specific intent to make the new county applicants home in order to change domicile.

> ***The States are empowered to establish appropriately defined and uniformly applied bona fide residence requirements and to require that voters be bona fide residents of the relevant political subdivisions.***

The Opinion and Order entered by the Court in *Ballas*, supra, (Appendix, infra, pp. _____) correctly describes the definitive meaning of Article 5.08(k) of the Texas Election Code and the word "indefinitely" which is acceptable under *Carrington* as quoted above and under the meaning expressed in *Dunn v. Blumstein*, _____ U.S.

_____, 40 U.S.L.W. 4269, and other United States Supreme Court cases cited therein.

The pertinent part of Article 5.08(k) which is objected to herein is directly in line with and consistent with *Carrington* as quoted above:

> Article 5.08(k). "*. . . A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student.*" (emphasis added).

The last sentence in Article 5.08(k), above quoted and underlined, is the establishment of an appropriately defined and uniformly applied bona fide residence requirements by statute as shown in the very recent *Dunn v. Blumstein*, supra, in which the United States Supreme Court struck down Tennessee's durational residency requirements. However, once again, as in *Carrington* and *Evans* the Court took pains to emphasize that the states are empowered to establish "appropriately defined and uniformly applied bona fide residence requirements", 40 U.S.L.W. at 4273, N. 13, and "to require that voters be bona fide residents of the relevant political subdivisions". Id. at 4274. Further, in administering such a requirement, a state's election officials may require production of "objective information" to show intent relevant to the questions of bona fide residence. Id. at 4275. Quite significantly, the *Dunn* Court cited *Carrington* for the proposition that Tennessee remain free to inquire "on an individualized basis whether one recently arrived in the community is in fact a resident."

The State of Texas does have a compelling state interest in preserving the purity of the ballot box by enacting laws which will insure that only duly bona fide residents of a community vote in that community elections and thus help to insure that the local electors vote is not fraudulently diluted.

In all three cases, *Wilson, Whatley* and *Ballas*, the plaintiffs were Texas citizens who already had a bona fide residence or domicile somewhere in Texas and had the right to vote somewhere in Texas. *Texas has a compelling state interest to set the rules to insure that those registering and voting are bona fide residents and not transients with temporary residences who will dilute the vote in the community.* The burden of proving a change of bona fide residence or domicile is on the student or others who are in a "particular category of citizens" referred to in *Carrington*, supra.

Stine v. Moore, 213 F.2d 446 (5th Cir. 1954), cited with approval in *Hendry v. Masonite Corp.*, 455 F.2d 955 (5th Cir. 1972):

> "The burden of proving diversity jurisdiction when challenged, is upon the plaintiff, but when it is shown, as in this case, that the (defendant) had a former domicile in Texas, the presumption is that it continues to exist, and the *burden shifts to the defendant to prove that it has changed.*" (emphasis added).

CONCLUSION

The State of Texas has a compelling state interest in preserving the purity of the ballot box as required by Article VI, Section 4 of the Constitution and laws of the

State of Texas by requiring that the provisions of Article 5.08(k) are enforced so as to insure that only bona fide residents of a relevant political subdivision are registered to vote there.

In carrying out its constitutional burden of preserving the purity of the ballot box, the states are properly empowered to establish the appropriately defined and uniformly applied bona fide residence requirements of Article 5.08(k) which are reasonable tests of intent to change domicile and to require that voters be bona fide residents of the relevant political subdivisions before registering to vote. The Respondent's fundamental right to vote has not been violated but only regulated by the State to preserve the integrity of the election process.

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CERTIFICATE OF SERVICE

I, SAM L. JONES, JR., one of the attorney for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1973, a true and correct copy of the foregoing Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit was served upon the Respondents and Attorneys of record by placing same in the United States Certified Mail with sufficient postage attached and addressed to David R. Richards, 600 W. 7th St., Austin, Texas, 78701; William H. Kugle, Jr., 301 1st State Bank Building, Athens, Texas, 75751; Frank T. Ivy, Union Building, Room 302, University of Texas, Austin, Texas, 78712; John E. Lawhon, County Attorney, Denton County, P. O. Box 44, Denton, Texas; Norris Yates, Jr., Assistant District Attorney, Bexar County Courthouse, San Antonio, Texas; and Tom Senff, P. O. Box 257, Nacogdoches, Texas, 85961.

_____

SAM L. JONES, JR.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1057

MARILYN WHATLEY and CAROL GERBER,
Plaintiffs-Appellees,

versus

T. J. CLARK, Etc., ET AL.,
Intervenors.

Appeal from the United States District Court for the Eastern District of Texas

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(August 3, 1973)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

THORNBERRY, Circuit Judge: A Texas statute provides that "a student in a school, college, or university"

shall not be considered to have acquired a voting residence at the place where he lives while attending school "unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student." Tex. Election Code art. 5.08(k).[1] Whether this provision infringes rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment, is the primary issue before us in this appeal.

Appellee Dennis Green, a student at North Texas State University in Denton County, Texas, made application to appellant George Lasater, Denton County Assessor and Collector of Taxes, to register to vote in Denton County. Pursuant to Article 5.08(k), *supra*, Lasater asked Green whether he intended to make his home in Denton County indefinitely after he ceased to be a student. Green replied that he had no such intentions, and Lasater refused to register him. On behalf of himself and all others similarly situated, Green brought suit in the court below seeking a declaration that Article 5.08(k) is constitutionally invalid. The court below held that the suit was properly maintainable as a class action,[2] and declared Article 5.08(k) invalid

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[1] With the exception of persons in the military service of the United States, Tex. Election Code art. 5.08(j), Texas does not expressly apply this rule to any group other than students. The validity of the rule as applied to members of the armed forces is not before us on this appeal, and we intimate no view as to its validity as applied to servicemen.

[2] The court below held that Green represented a class that included "students who consider their community their home but whose present intentions for the future either are unclear or are not definite enough to reflect plans to move to another community after graduation."

under the Equal Protection Clause.[3] We affirm the judgment below.

Before reaching the merits, we must dispose of two procedural points raised by appellants. First, it is argued that the court below erroneously denied appellants' request to convene a three-judge court. As noted above, however, *supra* note 3, appellees sought only declaratory relief with regard to Article 5.08(k). Under such circumstances, the court below correctly denied the request to convene a three-judge court. *Mitchell v. Donovan*, 398 U.S. 427, 90 S.Ct. 1763 (1970). Secondly, appellants argue that the instant suit cannot be properly maintained as a class action. Appellants point out that a determination of the voting residence of each member of the class will entail the resolution of questions of fact peculiar to each member. Appellees, however, were not seeking a declaration that each member of the class satisfied the voting residence requirements; rather they sought only a declaration that Article 5.08(k) is unconstitutional. The issue thus presented is amenable to resolution in a class action. *See Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972). We turn, therefore, to the merits.

At the outset, we must call attention to what is *not* at issue here. Texas has unquestioned power to restrict the franchise to bona fide residents. *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965). Indeed, such a restriction "may be necessary to preserve the basic conception of a

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[3] In the instant case we review only this declaratory judgment, although the case originated as a request for both declaratory and injunctive relief against Article 5.08(k) and another provision of the Texas Election Code governing durational residency requirements. The original complaint was later amended to include appellee Green's request solely for declaratory relief with regard to Article 5.08(k), and a separate trial was ordered as to his claims.

political community. . . ." *Dunn, supra,92 S.Ct. at 1004.*[4] At the same time, however, if residence requirements are to withstand constitutional scrutiny, they must be "appropriately defined and uniformly applied." *Id.* The issue in the instant case, therefore, is simply whether Article 5.08(k) represents a proper exercise of the State's power to impose reasonable residence requirements upon the right to vote.

Appellants suggest that there is little, if any, substantive difference between the residence requirements imposed upon students by Article 5.08(k) and the general standards applicable to other prospective voters. Subsection (a) of Article 5.08 provides that, for voting purposes, "residence" shall mean "domicile," and defines domicile as "one's home and fixed place of habitation to which he intends to return after any temporary absence." Further, subsection (b) of the same statute requires that residence "be determined by the common law rules as enunciated by the courts of this state," unless those rules are in conflict with the statute. Texas courts hold that a necessary element of domicile is a "freely exercised intention of remaining [at a place] *permanently or for an indefinite time*" [emphasis added]. *Harrison v. Chessir*, 316 S.W.2d 909 (Tex.Civ.App.–Amarillo 1958); *rev.d on other grounds*, 320 S.W.2d 814 (1959). *See also Snyder v. Pitts*,

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[4] Moreover, the instant case does not squarely present a challenge to the manner in which Texas defines residence for voting purposes, and this opinion is therefore not to be interpreted as adjudicating the validity of Texas' substantive rules for determining voting residence. We recognize, however, that at least two three-judge district courts have held similar definitions of voting residence to be unconstitutional. *See* Ramey v. Rockefeller, E.D.N.Y. 1972, 348 F.Supp. 750; Newburger v. Peterson, D.N.H. 1972, 344 F.Supp. 559.

150 Tex. 407, 241 S.W.2d 136 (1951); *Wilson v. Wilson*, 189 S.W.2d 212 (Tex.Civ.App.—Ft. Worth 1945); *Stone v. Phillips*, 171 S.W.2d 156 (Tex.Civ.App.—Amarillo 1943), *aff.d*, 142 Tex. 216, 176 S.W.2d 932 (1955).[5] For the purposes of this appeal, we assume without deciding that the same definition of domicile is applied to both students and other prospective voters.

It does not follow, however, that because Article 5.08(k) applies the same substantive standard to students as is applied to other prospective voters, the statute does not create a distinct class, for purposes of equal protecton analysis. If subsection (k) merely restates the rules applicable to other voters, one may well wonder why it exists separately and, indeed, why the requirement of intent to remain in the college community indefinitely after graduation, was added by amendment in 1967. Acts 1967, 60th Leg., p. 1879, ch. 873, § 21, effective August 28, 1967. The answer is apparent. Although it may apply the same *substantive* standard that applies to other voters, subsection (k) applies it to students in a different way. By its terms it creates a presumption that students are not domiciliaries of the places they live while attending school. Of course, the presumption is rebuttable; but unless a student carries the burden of persuading the voter registrar

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[5] Appellants urge this court to abstain, pending a construction of Article 5.08(k) by the Texas courts. In appellants' view, the word "indefinite" is ambiguous, meaning either "permanent" or "subject to change at any time." From the Texas cases cited above, however, it appears that the Texas courts use "indefinite" and "permanent" interchangeably in this context. Thus, the meaning of Article 5.08(k) seems tolerably clear: before a student may vote at the place where he lives while attending school, he must have a present intention of remaining there "permanently" after he ceases to be a student.

that he is in fact a domiciliary of the place where he resides for the better part of each year,[6] he is not permitted to vote there and is consequently denied an opportunity to participate in elections which may have considerably more impact on his life than do those in the area where he resided before becoming a student. Other prospective voters, on the other hand, are not subject to this presumption of nonresidency or to the attendant burden of overcoming it.[7]

The right to vote is a fundamental right preservative of other basic rights. *Reynolds v. Sims* 377 U.S. 533, 562, 84 S.Ct. 1362, 1381 (1964). A state statute that restricts the exercise of such a fundamental right is invalid under the Equal Protection Clause, unless it can be shown that the burden imposed is necessary to promote a compelling state

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[6] Although there is a wide variance in the quantum of proof demanded of students by voter registrars, the required showing can be quite extensive, as illustrated by the following inquiries taken from a questionnaire administered to students by the Waller County, Texas registrar:

> Do you intend to reside in Waller County indefinitely? How long have you considered yourself to be a bona fide resident of Waller County? What do you plan to do when you finish your college education? Do you have a job or position in Waller County? Own any home or other property in Waller County? Have an automobile registered in Waller County? Have a telephone listed in Waller County? Belong to a church, club, or some Waller County organization other than college related?

See Wilson v. Symm, No. 71-H-1437, S.D.Tex. 1972, at 4, n.2.

[7] Pursuant to Article 5.21 of the Texas Election Code, if the registrar "has reason to believe" that an applicant has made a false statement on an application for voter registration, the registrar "shall require proof of such statement." Since this requirement of proof arises only when the registrar has reason to doubt a statement on the application, it cannot be said that Article 5.21 imposes a burden of proving domicile upon all prospective voters.

interest. *Dunn, supra*; *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849 (1972); *Evans v. Cornman*, 398 U.S. 419, 90 S.Ct. 1752 (1972).

Appellants, however, contend that no such showing is necessary in the instant case, because in their view the Supreme Court approved this rebuttable presumption of nonresidency in *Carrington, supra*. There the Court invalidated a provision of the Texas Constitution that absolutely prohibited nonresident servicemen who had moved to Texas from ever acquiring a voting residence in the state for the duration of their military service. The Court observed that only members of the armed forces were subject to a conclusive presumption of nonresidency, although other groups—such as students and inmates of public institutions (citing an earlier version of Article 5.08)—which presented "specialized problems in determining residence," were "given at least an opportunity to show the election officials that they are bona fide residents." 380 U.S. at 95, 85 S.Ct. at 779-80. Relying on this observation, appellants argue that *Carrington* approved the instant treatment of students as presumptive nonresidents because the Texas presumption of nonresidency is rebuttable, giving students "at least an opportunity" to establish their claims of domicile.

This position reflects a misunderstanding of *Carrington*. First, because the requirement of intent to remain in the college community indefinitely did not become a part of Article 5.08(k) until two years after *Carrington* was decided, nothing in *Carrington* can be taken as expressly approving the statute in its present form. Secondly, and more importantly, the instant case presents an altogether different question from that in *Carrington*, Here, at issue is the validity of a scheme whereby some prospective voters

are subject to a rebuttable presumption of nonresidency, while others are subject to no such presumption. *Carrington*, on the other hand, involved a challenge to a scheme whereby one group was conclusively disenfranchised, while all other prospective voters were given "at least an opportunity" to establish their claims of residence. That some members of the favored group were subject to rebuttable presumptions of nonresidency while other members of the favored group were not, was immaterial to the question in *Carrington*. Rather, the determining factor there was the *conclusiveness* of the presumption with regard to servicemen. 380 U.S. at 96, 85 S.Ct. at 780. The Court in *Carrington* did not purport to evaluate the distinctions that Texas had made as between members of the favored class; its reference to the "opportunity" given to students (and other groups that presented "specialized problems in determining residence") to prove their claims of residence should be seen only in contrast to the total disenfranchisement of servicemen, not as tacit approval of a rebuttable presumption of nonresidency as applied to students. It is our view that *Carrington* does not foreclose a challenge to the instant statute; therefore we turn to the question whether Article 5.08(k) is necessary to promote a compelling state interest.

Appellants suggest only that the statute "preserves the purity of the ballot," an interest express in Article 6, §4 of the Texas Constitution. While, as we have pointed out above, Texas has a legitimate interest in limiting the franchise to bona fide residents and in guarding against fraudulent evasions of valid residence requirements, we find it difficult to believe that a presumption that students are not residents of their college communities is *necessary* to promote those goals. As the Supreme Court recognized in *Dunn, supra*, a voter registration system based on

reasonable durational residency requirements adequately protects the state's interest in the "purity of the ballot." 92 S.Ct. at 1005. Indeed, one of the original named defendants in the instant suit, former Texas Secretary of State Robert Bullock, testifying at the state's chief election officer, stated unequivocally that Article 5.08(k) created a "special classification" that served no purpose other than to discourage students from voting. In short, appellants have not demonstrated that treating persons as presumptive nonresidents simply because they are students is necessary to promote any compelling state interest. Accordingly, the judgment of the court below is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MARILYN WHATLEY, ET AL.	)	
	)	
V.	)	
	)	CIVIL ACTION NO. 547
T. J. CLARK, ET AL.	)	

MEMORANDUM OPINION AND ORDER

Enfranchising a new generation of voters has spawned a number of constitutional challenges to the states' voting laws. This case challenged the constitutionality of that portion of a Texas statute, Article 5.08(k) of the Texas Election Code, requiring that a student wishing to vote in the community of his school affirm that he "intends to remain there and to make that place his home indefinitely after he ceases to be a student." Plaintiffs base their claim on the Equal Protection clause of the Fourteenth Amendment, the Twenty Sixth Amendment, and 42 U.S.C. § 1983. Jurisdiction is proper under 28 U.S.C. §§ 1343, 2201, and 2202. Since plaintiffs seek only declaratory relief regarding the constitutionality of a statute of statewide application, convening a three-judge court is not required. *Flemming v. Nester*, 363 U.S. 603 (1960); *cf. Mitchell v. Donovan*, 398 U.S. 427 (1970).

The relevant facts are not in dispute. Plaintiff Dennis Green is a student at North Texas State University and has lived in Denton County for thirteen months. Green testified that he rents his apartment in Denton County, and that he considers Denton County his home. He further testified that his present intention is to remain in Denton County until graduation, but that he has no firm plans after graduation. When he attempted to register to vote, Green was asked by the Honorable George Lasater, County Tax Assessor-Collector of Denton County, whether he intended to make Denton County his home indefinitely after he ceased to be a student. Soley because Green replied that his postgraduate plans were unclear, Lasater refused to register him. During the hearing on this case, Green affirmed his continued interest in registering to vote.

Plaintiff Barbara Kreps, a registered voter of Denton County, serves as a Deputy Registrar of Voters in Denton County for the year 1972 and in this capacity considers herself bound by the instructions of Lasater. Miss Kreps was authorized to register and did register qualified students at both Texas Woman's University and North Texas State University. She testified that she is uncertain as to the meaning of Article 5.08(k), and that her uncertainty places her in jeopardy of prosecution for unlawfully registering voters.[1] Miss Kreps testified that on at least one occasion, she was suspended by Lasater for registering a student that Lasater considered unable to meet the requirements of Article 5.08(k). Miss Kreps subsequently was restored to her position as deputy, but was given no further instructions from Lasater.

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[1] Tex. Penal Code Ann., art. 235 (1952).

Plaintiff-intervenor William Dixon Bentson is a registered voter in Travis County and President of the Student Senate of the University of Texas at Austin. Bentson claimed to represent the interests of the registered students in the University community who were threatened by recent activities of certain Austin citizens expressing an interest in challenging the qualifications of the approximately 15,000 students registered to vote in Travis County. Since resolution of the narrow issue before this Court is adequately presented by the controversy between plaintiff Green and defendants Lasater and Robert Bullock, the Secretary of State and Chief Election Officer of the State, the Court does not reach any questions of standing as to the plaintiff Kreps and plaintiff-intervenor Bentson.

Plaintiff Green brings this action in behalf of himself and all other students otherwise eligible to vote who would be able to register to vote in the community of their school except that they are unable to affirm that they intend to remain in the community indefinitely after graduation. Rule 23(b)(2), Red.R.Civ.P. The class includes students who consider their school community their home but whose present intentions for the future either are unclear or are definite enough to reflect plans to move to another community after graduation. The maintenance of this action as a class action is proper. *E.g., Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 (5 Cir. 1968).

The challenged provision of the Texas statute reads as follows:

> The residence of a student in a school, college or university shall be construed to be where his home was before he become such student unless he has

become a bona fide resident of the place where he is living while attending school or of some other place. A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student.

For purposes of Equal Protection analysis, both the provision raising a presumption that a student is a resident of the place "where his home was before he became such student" and the provision requiring that a student affirm his intention to remain in the college community "indefinitely after he ceases to be a student" are suspect. Some courts have struck down a requirement that a student must overcome a rebuttable presumption that he is not a resident of his college community. *E.G., Bright v. Baesler,* _____ F. Supp. _____ (E.D. Ky.) (No. 2249, Dec. 20, 1971); *Wilkins v. Bentley*, 189 N.W. 2d 423 (1971). Sufficient for disposition of the instant case is this Court's holding that the provision requiring that a student affirm his intention to remain in the college community indefinitely after graduation as a prerequisite to registration is violative of the Equal Protection clause of the Fourteenth Amendment.

The decision is not without precedent. This Court is aided considerably by the careful opinion of Judge Coffin for the three-judge court deciding *Newburger v. Peterson*, _____ F. Supp. _____ (N.H.) (No. 3483, June 8, 1972).[2] In *Newburger*, the court declared unconstitutional

[2] "As this court reads *Wilson v. Symm*, 314 F. Supp. 8 (S.D. Tex. 1972), relied upon by defendants, the *Wilson* court reached and rejected three arguments not relied upon by this court in determining the constitutionality of the statute: (1) that the

the New Hampshire common law of domicile—applied to determine residence for voting purposes—that viewed intention to remain permanently or indefinitely in a particular community as essential for the acquisition of domicile. The law had been applied to prevent a student of Dartmough College from registering to vote in Hanover solely on the ground that he stated to voter registration officials that he intended to leave Hanover after graduation in June 1974.

After stating the applicable standard announced by the Supreme Court in *Kramer v. Union Free School District*, 395 U.S. 621 (1969) and reaffirmed recently in *Dunn v. Blumstein*, 40 U.S.L.W. 4269 (March 21, 1972) (exclusions from the franchise must be "*necessary* to promote a *compelling* state interest"), the *Newburger* court rejected the argument that passages from prior Supreme Court decisions had foreclosed by implication consideration of the instant question. The next inquiry, whether the law is necessary to promote a compelling state interest, focused on defendants' argument that the New Hampshire provision promoted a more intelligent vote by insuring that voters have a commitment to the community and a stake in the outcome of local elections. The *Newburger* court tracked the reasoning of the Supreme Court in *Dunn* in analyzing, and the rejecting, the proferred compelling state interest.

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[2] (continued)

statute creates a rebuttable presumption of nonresidency that is unconstitutional under the Fourteenth and Twenty-Sixth Amendments; (2) that the statute places undue discretion in defendants in violation of the Fourteenth Amendment; and (3) that the student residency scheme coupled with the federal census practice of counting college students where they are found, produces a malapportionment in contravention of the one-man-one-vote requirement."

Defendants in the instant case apparently rely on no compelling state interest. The Honorable Robert Bullock, Secretary of State for the State of Texas and the "Chief Election Officer" for the State,[3] testified on oral deposition as follows:

Q: Mr. Bullock: In terms of your position as State Election Officer, can you tell us what interest of the State, if any, is served by the special classification of students and special tests of residency that are therein imposed, if you know of any?

A: Well, it has been my position, to tell you the truth, that it is a special classification, number one; and I have yet to find a compelling State reason, as far as I am concerned, and this office is concerned, for that requirement.

Q: All right. As you view it as State Chief Election Officer, is it necessary that special classification of students is necessary to prevent vote fraud or to preserve purity to the ballot?

A: I don't think it is in this day and time. There might have been a reason at some time, a reason that I am not aware of; but in this day and time, I don't think that's the case.

Q: As far as you view it as State Chief Election Officer, is that provision necessary to insure and inform the electorate—necessary to insure and inform the electorate?

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[3] *See* Article 1.03, Texas Election Code.

A: I don't believe it is any more, in light of the fact that a person is required to register thirty days prior to the time of the election in the place where he resides, and I cannot see any reason.

Q: In your observation, have you as State Chief Election Officer, found students to be less informed about local issues than other persons who offer themselves–

A: It has been my position that they are better informed.

Q: All right, sir. The students are better informed?

A: Yes.

Q: All right, sir, in your position as State Chief Election Officer, is there any administrative reason; that is, within the State registration processes, that require a special treatment of students, as you see it?

A: No; in fact, quite to the contrary; I think it imposes a burden on the County Clerks throughout Texas the way it is under our present system.[4]

Bullock further testified that in his opinion the law was passed to discourage students from voting.[5] Accordingly, it is

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[4] Deposition of Robert Douglas Bullock, pages 9-10.

[5] "By that I refer to voting by mail, absentee by mail. If a student is going to the University of Texas here in Austin, and let's say he voted and registered in the county in which his parents reside, in Tyler, Texas, he has got to write the County Clerk in Smith

ORDERED that the provision in Article 5.08(k) of the Texas Election Code requiring that a student wishing to vote in his college community affirm his intention "to remain there and to make that place his home indefinitely after he ceases to be a student" is, and it is hereby declared

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[5] (continued)

County, the ballot has got to be sent to him, he has got to go to a notary public and have it notarized. In many instances they charge two or three dollars for that service. And then he has got to, in turn, send it back up there, hoping to get it there on time, because there is a time limit in there; and it just appears to me it is an unreasonable type of requirement.

Q: All right, then as you see it, if I am correct, the right of a student, let's say, who is attending school in Austin, to vote absentee by mail in the county of his parents' residence is not an adequate substitute for the right to go down and vote at a polling place as other citizens do?

A: I see no reason not to permit him to do so. When you speak of "purity of the ballot," you are assuming he is going to automatically walk in there and vote in a particular race on which he is not informed; he is not required to vote in that race; he can vote in those he wishes to vote in.

Q: All right, you have mentioned—well, let me see if I can ask your opinion on this: In view of your answer, is it your opinion that it is more burdensome on a voter to have to try to vote absentee by mail than to go on election day to the polling place and cast his ballot?

A: Well, in many cases, it is certainly more burdensome and certainly more expensive.

Q: All right. And I think you have recited for us—the requirements are, I guess, a mail application first to the County Tax Assessor or the County Clerk in their home county; is that correct?

A: Correct.

to be, unconstitutional as violative of the Equal Protection clause of the Fourteenth Amendment.

SIGNED and ENTERED this 2nd day of October, 1972.

Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF TEXAS

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[5] (continued)

Q: And that has to be transmitted to him by the ballot; is that correct?

A: Has to be processed by the Clerk.

Q: All right. And then the voter, as I understand it, must seek out a notary public to vote the ballot; is that correct:

A: That is correct.

Q: And then, of course, return it by the deadline by mail to the County Clerk's Office?

A: That is correct. And I also want to mention—I keep coming back to it—the fees and the notary public requires, in my opinion, it takes the form of a poll tax.

Q: Now, you said, I think, that it is a burden on the voter; is it also, in your observation, a burden on the Office of the County Clerk to process and mail ballots?

A: Well, in my opinion, it is, for several reasons: First of all, the State of Texas furnishes no money to a County Clerk to handle absentee balloting in a primary, for example; yet, unquestionably, with the record number of voters turn-out in this day and time, the County Clerk is going to have to employ additional help to handle the volume of voting requirements, applications, et cetera, that come in. If he doesn't they may not go out on time, and it just appears to me like it is not only an extremely cumbersome procedure, but a very expensive one.
(Deposition of Robert Douglas Bullock, pp. 11-12.)

SUPREME COURT, U. S.

FILED

DEC 3 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-835

MARK WHITE, JR.
Secretary of State of Texas

Petitioner

VS.

MARILYN WHATLEY AND CAROL GERBER ET AL,

Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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U.S. Court of Appeals, Filed Aug. 29, 1973
Edward W. Wadsworth, Clerk

IN THE

UNITED STATES COURT of APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1057

MARILYN WHATLEY and CAROL GERBER,
Plaintiffs-Appellees,

versus

T. J. CLARK, Etc., ET AL.,
Defendants-Appellants,

EMMA MARIA GARZA, ET AL.,
Intervenors.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING

(AUGUST 29, 1973)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Clerk U.S. District Court Southern District of Texas
Filed Mar. 29, 1972
V. Bailey Thomas, Clerk, by Deputy, A. Smith
Civil Action No. 71-H-1437

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

ARTHUR RAY WILSON, DONNIE GENE YOUNG, LEODIES SIMMONS, RANDOLPH GRAYSON and BILLY RAY TOLIVER,
Plaintiffs
v.
LEROY E. SYMM, COUNTY TAX ASSESSOR-COLLECTOR, WALLER COUNTY, TEXAS, and BOB BULLOCK, SECRETARY OF STATE OF THE STATE OF TEXAS,
Defendants.

MEMORANDUM AND ORDER

This action is brought by five college students enrolled at Prairie View Agricultural and Mechanical College in Prairie View, Texas, seeking to compel the County Tax Assessor-Collector of Waller County, Texas, in which the college is located, to register plaintiffs to vote. Although originally pleaded as a class action, that aspect of the complaint has been abandoned and plaintiffs now proceed in this own behalf. Jurisdiction is predicated upon 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343.

In the third amended complaint, it is alleged that each plaintiff is over eighteen years of age, is a resident of Waller County, is eligible to vote under state law, and has filed an application for voter registration with defendant Symm. Plaintiffs assert that Symm unconstitutionally declined to register them to vote, after having impermissibly required that they and other students complete a questionnaire as a condition of consideration for registration. It is argued that this constitutes a discrimination against plaintiffs on the basis of their status as students and their age, in violation of the Fourteenth and Twenty-Sixth Amendments. In so abridging plaintiffs' rights, defendant Symm is conceded to be acting pursuant to a Texas statute, Tex. Elec. Code Ann. art 5.08(k), which creates a rebuttable presumption of non-residency on the part of college students. Plaintiffs argue that this statutory presumption is irrational and singles out students for special treatment in determining their residency, thus "fencing them out" from the franchise in the absence of a compelling state interest for doing so. Additionally, the degree of discretion which is reposed by the statute in defendant Symm is attacked as violative of due process of law. Finally, plaintiffs argue that the Texas student residency scheme, coupled with the federal census practice of counting college students where they are found, produces a malapportionment in contravention of the one-man-one-vote requirement of the Federal Constitution. Note should be taken of a contention which was abandoned. As originally pleaded, in the original complaint and the first amendment of same, plaintiffs alleged racial discrimination on the part of defendants in violation of the Federal Constitution as well as the Voting Rights Act, 42 U.S.C. §1971. This ground was voluntarily and totally deleted in the plaintiffs' final amended pleading upon which plaintiffs proceeded to trial.

Although this suit was filed on December 15, 1971, it did not fall upon this Court's docket until shortly thereafter. It was immediately set down for preliminary pretrial hearing on January 18, 1972, at which hearing discovery matters were considered, leave to amend was granted both parties, prospective motions were discussed and a briefing schedule was established. On February 3, 1972, a hearing was had on the motions, following which counsel were given additional time to file authorities and briefs on plaintiffs' request for convocation of a three-judge court. For the reasons assigned in its Memorandum and Order of February 16, 1972, this Court declined to notify the Chief Judge of the Circuit for the purpose of convening such a court. Review of this Order was sought by interlocutory appeal as well as mandamus, both without success. See *Wilson v. Noel*, No. 72-1466 (5th Cir., March 9, 1972). The trial setting of March 13, 1972, was passed for one week upon motion of plaintiffs. On March 20, 1972, trial was had in Houston, Texas, at which time evidence was received and the arguments of counsel were heard. The Court now enters its findings of fact and conclusions of law. Rule 52(a), Fed.R.Civ.P.

FINDINGS OF FACT

(1) The five plaintiffs are regularly enrolled students at Prairie View Argicultural and Mechanical College ("Prairie View") in Waller County, Texas. All plaintiffs are over eighteen years of age and are members of the Negro race. Prairie View is a state-supported four-year college with a total enrollment of approximately 4000 students, more than 95% of whom are Negroes.

(2) Defendant Bullock is the Secretary of State of the State of Texas. As such, he is the State's chief election

officer. Tex. Elec. Code Ann. art 1.03. Defendant LeRoy E. Symm is the county tax assessor-collector for Waller County and has held that office since 1956. As such, he is the officer responsible for the registration of voters. Tex. Elec. Code. Ann. art 5.09a. Waller County, a predominantly rural county, has a population of approximately 14,000 persons, of whom 4600 are registered voters. Defendant Symm is personally acquainted with approximately 60% of those registered.

(3) To facilitate the performance of his duties, which include the determination of the residency of applicants for voter registration, defendant Symm has prepared a Questionnaire Pertaining to Residency (hereafter "questionnaire") for use beginning in the Fall of 1971.[1] It is composed of sixteen short questions, which are set out in the margin.[2] It was formulated by Symm with the assistance of the County Attorney, but has not been formally approved by any state officer. When a potential student registrant completes his Application for Voter Registration Certificate, he must place a mark in a space which reads "check here if serviceman or student". The categories of students and servicemen are completely overlapping in this instance, as the only military detachment in Waller County is the Reserve Officers Training Corps unit at Prairie View. An applicant who has thus marked the blank of the Registration Certificate is then required to complete the questionnaire. Therefore, the only applicants who are required to complete the questionnaire are students. In effect, the function of the questionnaire is to provide student applicants a means by which to overcome the statutory presumption of non-residency which is applicable to them.

(4) There are only two exceptions to this general practice. Defendant Symm does not require the question-

naire to be completed by married students or students who have parents residing in Waller County. Apparently, these two categories of students are permitted to register without further ado.

(5) Defendant Symm testified that his purpose in requiring that students complete the questionnaire is simply to provide himself with a factual basis for applying and enforcing the general residency statute, including the portion relating to student residency. The Court accepts this testimony and finds that Symm was so motivated and has acted at all times in good faith.

(6) Each plaintiff testified in his own behalf, and the following data pertinent to the residency determination was elicited.

(6-a) Arthur Ray Wilson, age 22 and a native of Beaumont, Texas, has attended Prairie View for four years and states that he considers Waller County his home and would like to return there upon completion of a post-graduate military commitment. He has been employed by Prairie View as a student counselor for three years but has no future job commitment there. He is unmarried and was living in a campus dormitory at the time he applied for registration, although he has since moved to an off-campus apartment. He owns an automobile which is licensed in Waller County.

(6-b) Randolph Grayson, age 29 and a native of Gulfport, Mississippi, has attended Prairie View and lived in Waller County for four years, and states that he will not return to Gulfport upon graduation as he considers Waller County to be his home. He came directly to Prairie View upon his discharge from the Army, and now lives in an

apartment in Hempstead, Texas. He has no future job commitment, but intends to stand for election to the office of precinct constable in Waller County. Acting upon the advice of an attorney, plaintiff Grayson declined to complete the residency questionnaire.

(6-c) Donnie Gene Young, age 20 and a native of Houston, Texas, has attended Prairie View and lived in Waller County for two and one-half years, and states that he intends to return to Prairie View and work for the college upon completion of his post-graduate military obligation. He presently has no job promised to him. He now lives off-campus, at the home of his aunt.

(6-d) Leodies U. A. Simmons, age 19 and a native of Weirgate, Texas, has attended Prairie View and lived in Waller County for two years, and testified that he intends to remain there indefinitely. He lives on-campus in a dormitory. This plaintiff had not applied for voter registration at the time that suit was filed, contrary to the assertion in the complaint which bears his name. Until a few days before trial, he was not even aware that a suit had been brought in which he was a plaintiff.

(6-e) Billy Ray Toliver, age 27 and a native of Houston, Texas, has attended Prairie View and lived in Waller County intermittently for the past several years. It appears that he attended Prairie View for two years, entered the military service for two years, was then employed for a period in Houston where he lived with his parents, and has now returned to Prairie View. He has no firm employment prospects in Waller County but states that he would like to remain there upon graduation. Upon the advice of an attorney, he declined to complete the residency questionnaire.

(7) Although defendant Symm did not rely upon it in making his determination, the fact was brought out at trial that each of the plaintiffs, upon registering for enrollment at Prairie View in August of 1971, represented to the college's registrar that his home was elsewhere than Waller County. Plaintiff Wilson gave a home address in Beaumont, Texas. Plaintiff Simmons gave a home address in Weirgate, Texas. The other plaintiffs gave home addresses in Houston, Texas. These recent representations in respect to residency are, of course, inconsistent with the assertions made by plaintiffs at trial.[3] These prior inconsistent statements, made before this litigation was a prospect, are entitled to great weight on the point of credibility and lead the Court to find that plaintiffs do not in fact regard themselves as residents of Waller County. As stated in Conclusion of Law I below, the question of plaintiffs' residency is not before this Court. However, should this conclusion be erroneous and should the question of residency be presented, this Court would find, and does find, that plaintiffs are not residents of Waller County.

(8) Defendant Symm based his decision upon as assessment of a student applicant's total relationship to the community, and formulated his questionnaire accordingly. However, Symm testified that he found the following factors particularly persuasive, and would invariably register students who: (1) had parents residing in Waller County, (b) were married and living with their spouses in Waller County, (c) owned real property in Waller County, or (d) had a firm offer of employment in Waller County upon graduation.

(9) For the year 1972, defendant Symm has registered approximately forty Prairie View student applicants out of a total of approximately seventy-five who applied. He has

therefore accepted more student applications than he has rejected. This indicates that the rebuttable presumption of student non-residency, as administered in Waller County, is frequently rebutted and is clearly not an insurmountable barrier to the franchise.

(10) None of the plaintiffs sought de novo review of Symm's decision by means of perfecting an accelerated appeal to the Waller County District Court, as provided by Tex. Elec. Code Ann. art. 5.17(a).

(11) Defendant Symm declined to register plaintiffs to vote after reaching a good-faith determination that plaintiffs were not residents of Waller County within contemplation of the state residency statute. This conclusion, necessarily judgmental in nature, was neither arbitrary nor capricious. In the case of plaintiffs Wilson, Young and Simmons, this determination was based upon information provided in the questionnaire. In the case of plaintiffs Toliver and Grayson, this determination was based upon the refusal of the applicants to complete or sign the questionnaire. In no case was the determination attributable to the applicants' age or their status as students, per se. Furthermore, although the issue was abandoned and was therefore not directly raised by either the pleadings or the proof, it is appropriate to observe that the record contains not the slightest suggestion of discrimination on the basis of race. Indeed, on direct examination by plaintiffs' counsel, defendant Symm testified that no application was rejected by reason of the applicant's race. The Court accepts this testimony as credible, and so finds.

CONCLUSIONS OF LAW

(I) At the outset, it must be emphasized that plaintiffs do not urge this Court to review defendant Symm's

determination of plaintiffs' residency. Plaintiffs do not contend that Symm has erroneously applied the state student residency statute, nor do they contend that a correct application of the statute would achieve the desired relief. Indeed, if such a contention were offered, it would clearly be the duty of this Court to abstain pending an application of the statute by a state court. *Harris v. Samuels*, 440 F.2d 748 (5th Cir.1971), cert.denied —— U.S.——, 40 U.S.L.W. 3163 (Oct. 12, 1971); *Romero v. Caldwell*, ——F.2d——, No. 71-1414 (5th Cir., Feb. 8, 1972); *Carr v. Brazoria County*, ——F.Supp.——, C.A. No. 71-G-210 (S.D. Tex., Feb. 5, 1972). Rather, it is plaintiffs' position that the Texas student residency statute, even when correctly applied, violates the Federal Constitution.

(II) Also, it should be strongly reiterated that this is not a racial discrimination case. It is a student voting case, and the fact that all plaintiffs are Negroes is no more than a fortuitous consequence of the fact that the only aggregation of college students in Waller County happens to be at Prairie View, which for historical reasons has a predominantly Negro student body. It follows that the statutory and decisional law relating to racial disfranchisement is for the most part irrelevant to this suit.

(III) The specific statutory provision which is assailed, Article 5.08(k) of the Texas Election Code, must be read in pari materia with its companion provisions. The statutory scheme relating to residence is embodied in Article 5.08, which provides in relevant part:

> (a) As used in this code, the word 'residence' means domicile; i.e., one's home and fixed place of habitation to which he intends to return after any temporary absence.

(b) For the purpose of voting, residence shall be determined in accordance with the common law rules as enunciated by the courts of this state and the following statutory rules; but in case of a conflict, the statutory rules shall control.

(c) A person shall not be considered to have lost his residence by leaving his home to go to another place for temporary purposes only.

(d) A person shall not be considered to have gained a residence in any place to which he has come for temporary purposes only, without the intention of making such place his home.

(e) [Relates to single persons and separates spouses.]

(f) [Relates to married men living with family.]

(g) [Relates to married men living apart from family.]

(h) [Relates to married women.]

(i) [Relates to employees of federal and state governments.]

(j) [Relates to military personnel.]

(k) The residence of a student in a school, college, or university shall be construed to be where his home was before he became such student unless he has become a bona fide resident of the place where he is living while attending school or of some other place. A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student.

(l) [Relates to inmates of public charitable institutions.]

In support of their facial constitutional attack upon Article 5.08(k), plaintiffs contend that it is based upon an irrational presumption which singles out students for

special treatment in determining their residency, in the absence of a compelling state interest for doing so. Further, it is alleged that the statute "fences students out of city and county elections, while allowing others to exercise the franchise, although students do not have the 'degree of disinterest' required by the United States Supreme Court to justify exclusion from the franchise in Waller County."

In assessing the validity of plaintiffs' equal protection attack upon the statute, we need look no further than *Carrington v. Rash*, 380 U.S. 89 (1965), in which the challenged statute was specifically approved. *Carrington* involved an attack upon the federal constitutionality of a provision of the Texas Constitution which flatly prohibited military personnel from establishing voting residency in Texas. This was an absolute prohibition from which no administrative escape was permitted, i.e., there was no means provided by which a soldier could establish bona fide residency in the county where he was stationed, thus overcoming the bar. In justification, the State first argued that the provision was necessary to prevent domination of local political affairs by large concentrations of soldiers, who might not be ideal voting citizens due to their short-term interest in the community and their obvious susceptibility to military command influence. The Court summarily rejected these attempts to rationalize the total disfranchisement of soldiers, observing that " '(f)encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S. at 94.

The Court's treatment of the State's second argument in *Carrington* is of immediate relevance, and, indeed, controls the issue at bar. The State contended that its voting ban on

military personnel was justified because of the transient nature of service in the armed forces, and was thus necessary to protect the integrity of its residence qualification. The Court did not question the validity of the residence requirement; rather, it stated that "(w)e stress–ant this a theme to be reiterated–that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community." 380 U.S. at 93. However, in achieving that end, it was not permissible for Texas to employ the blunderbuss device of automatically denying the franchise to all soldiers. An insistence upon community residency was permissible, so long as the determination was made by a more discriminating device than disfranchisement of an entire class which is legislatively deemed suspect of transiency. As the Court stated the critical point.

> But only where military personnel are involved has Texas been unwilling to develop more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote. The State's law reports disclose that there have been many cases where the local election officials have determined the issue of bona fide residence. These officials and the courts reviewing their actions have required a 'freely exercised intention' of remaining within the State, *Harrison v. Chesshir*, 316 SW.2d 909, 915. The declarations of voters concerning their intent to reside in the State and in a particular county is often not conclusive; the election officials may look to the actual facts and circumstances. *Stratton v. Hall*, 90 SW.2d 865, 866. *By statute* [citing Article 5.08] *Texas deals with particular categories of citizens who, like soldiers, present specialized problems in determining residence. Students at colleges and universities in Texas, patients in hospitals and other institutions within the*

State, and civilian employees of the United States Government may be as transient as military personnel. But all of them are given at least an opportunity to show the election officials that they are bona fide residents.

380 U.S. at 95 (emphasis added).

From the emphasized language, which specifically refers to the precise statute[4] under attack and makes specific reference to its categorization of "students at colleges and universities in Texas", it is obvious that the State is entitled to assume that students are transients in their university communities, so long as a reasonable opportunity is afforded such students to make a showing to the contrary. *Carrington* makes it clear beyond cavil that the State Legislature, having reached the rational conclusion that college and university students "present specialized problems in determining residence", is empowered to clothe such students with a rebuttable presumption of non-residency in their college towns. In view of its specific approval in *Carrington* some seven years ago, this Court must conclude that the challenged provision, fairly and evenhandedly administered, is on its face constitutionally unobjectionable.

More recently, in *Evans v. Cornman*, 398 U.S. 419 (1970), the Board of Registry of Montgomery County, Maryland, struck from the voting rolls the names of all residents of a federal medical facility located within the boundaries of that county. The Board was apparently actuated by its belief that inhabitants of a federal enclave automatically failed to meet the residency requirements of the State Constitution. In effect, the Board erected precisely the sort of irrebuttable presumption of non-

residency which was condemned in *Carrington*. Predictably, a three-judge federal district court enjoined the Board's action as violative of the Equal Protection Clause. In affirming, the Supreme Court relied upon *Carrington*, but was careful to reiterate that a State is not precluded from establishing machinery for preserving the integrity of its lawful residency requirements:

> *Maryland may, of course, require that 'all applicants for the vote actually fulfill the requirements of bona fide residence.' Carrington v. Rash*, 380 U.S. 89, 96 (1965). 'But if they are in fact residents, with the intention of making [the State] their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation." Id. at 94.

398 U.S. at 421 (emphasis added).

Even more recently decided, and of considerable significance, is *Dunn v. Blumstein*, ____ U.S. ____, 40 U.S.L.W. 4269 (U.S., Mar. 21, 1972), in which the Supreme Court struck down Tennessee's durational residency requirement as violative of the Equal Protection Clause. *Dunn* was a *Carrington*-type case, and the Court's repeated citations to *Carrington*, as well as its approving discussion of *Carrington*, suggest that *Carrington* is still very much alive in all its aspects.

The plaintiff in *Dunn* moved to Tennessee less than two months before a primary election, and was accordingly rebuffed in his attempted registration because of failure to satisfy the State's constitutional and statutory requirement of twelve months residency in the State and three months residency in the county of registration. Despite his noncompliance with the durational requirements, it was

undisputed that the plaintiff was a bona fide resident of the State and county when he attempted to register. The Court held that the State had shown no compelling justification for automatically and completely disfranchising all new arrivals, thus absolutely denying their right to vote and severely penalizing their right to inter-state travel. Once again, however, as in *Carrington* and *Evans*, the Court took pains to emphasize that the States are empowered to establish "appropriately defined and uniformly applied bona fide residence requirements", 40 U.S.L.W. at 4273, n. 13, and "to require that voters be bona fide residents of the relevant political subdivision." Id. at 4274. Further, in administering such a requirement, a State's election officials may require production of "objective information" relevant to the question of bona fide residence. Id. at 4275.

The constitutional infirmity of the Tennessee statute involved in *Dunn* was that a durational residence requirement amounts to a conclusive and inescapable presumption that recent arrivals are not residents. Recognizing that "(t)he State's legitimate purpose is to determine whether certain persons in the community are bona fide residents", Id., at 4276, the Court simply forbade the States to make that determination on the basis of a durational residency test which, though administratively convenient, had the inevitable result of lumping together and disfranchising all new arrivals—both bona fide residents and non-residents alike. Like the Texas provision in *Carrington* and the Board's practice in *Evans*, Tennessee's dragnet residency classification was "all to imprecise." Id. at 4276.

Quite significantly, the *Dunn* Court cited *Carrington* for the proposition that Tennessee remained free to inquire "on an *individualized basis* whether one recently arrived in the community is in fact a resident, although of course

there will always be difficult cases." Id. at 4276, (emphasis added). In protecting the integrity of the residency requirement, the Court noted, the purpose served by the unconstitutional irrebuttable presumption could as well be served by an "individualized inquiry" directed at new arrivals for the purpose of assessing compliance with Tennessee's test for bona fide residence. It is precisely such an "individualized inquiry" which defendant Symm, acting under Article 5.08(k), directs at student applicants. In view of *Evans'* and *Dunn's* reiteration of the qualifying principle in *Carrington*, this Court takes it to be still the law that a State may enforce a valid local residency requirement and—when confronted by a class of persons which presents special problems in determining residency—may employ inquiry procedures (such as the questionnaire in the instant case) reasonably related to that end.

This Court is mindful, of course, that other courts have in recent months reached a contrary result on equal protection grounds.[5] However, none of these cases deals adequately with *Carrington*. Albeit dictum, the language in *Carrington*, supported by that in *Evans* and *Dunn*, represents a clear expression by the United States Supreme Court that the application of a controvertible presumption of non-residency to certain inherently transient classes does not offend the Constitution. In holding to the contrary, it is incumbent upon a lower court to notice and distinguish or otherwise treat of this prestigious authority. Having failed to do so, the cases relied upon by plaintiffs are deemed to be unpersuasive.

Accordingly, this Court concludes that Article 5.08(k), on its face and as applied by defendant Symm, does not violate the Equal Protection Clause of the Federal Constitution.

(IV) It is also asserted that Article 5.08(k) is invalid because it vests untrammeled discretion in the assessor-collector without sufficiently defining the standards to guide that discretion. This assertion is without merit. By its nature, the concept of residence defies precise statutory explication, as it depends upon the circumstances of each case and embraces various elements such as volition, intention and actions. *Mills v. Bartlett*, 377 SW.2d 636 (Tex. 1964). The Texas statute provides that "residence shall be determined in accordance with the common law rules as enunciated by the courts of this state and the following statutory rules. . ." Tex. Elec. Code Ann. art. 5.08(b). The statute then proceeds to set out with more particularity the rules applicable to several categories of potentially transient citizens, including students. See Conclusion of Law III, supra. In this respect, the statute is considerably more detailed than many of its kind, for over half the States make no mention of students in defining residency for voting purposes. See P. R. Rentenback, *Student Voting Rights in University Communities*, 6 Harv. Civ. Rights – Civ. Lib. L. Rev. 397, 407 n. 70 (1971). In any event, as the Supreme Court noted in *Carrington*, the Texas law reports are replete with cases expounding the subject of bona fide residency. A conscientious assessor-collector is not without standards to guide his determination of an applicant's residency, and that determination is subject to expeditious and de novo scrutiny in the Texas courts. Accordingly, this Court concludes that Article 5.08(k) is not void under the Federal Constitution by reason of vagueness, indefiniteness, or delegation of unbridled discretion.

(V) Plaintiffs' agrument predicated upon the Twenty-Sixth Amendment must also fail. In ultimate finding of fact #11, supra, the Court found that plaintiffs were

denied registration on the ground of non-residency, and not because two of them are between the ages of eighteen and twenty-one. It follows, of course, that their right to vote has not been "denied or abridged .... on account of age." U.S. CONST. amend. XXVI.

(VI) The presumption of student non-residency is neither irrational nor imprecise. *Carrington* teaches that such a statutory presumption may constitutionally attach to "particular categories of citizens who, like soldiers, present specialized problems in determining residence", so long as they "are given at least an opportunity to show the election officials that they are bona fide residents." 380 U.S. at 95. As Texas affords to student applicants such an opportunity, the rebuttable presumption is constitutionally sound.

(VII) Finally, plaintiffs contend that the one-man-one-vote principle, *Reynolds v. Sims*, 377 U.S. 533 (1964), requires that Prairie View students be permitted to vote in Waller County because that is where they are enumerated as residents by the United States Bureau of Census for purposes of representation. See *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3rd Cir. 1971). This rather esoteric theory has been advanced in the literature. See Note, *Student Voting and Apportionment: The "Rotten Boroughs" of Academia*, 81 Yale L. J. 35 (1971). However, the parties have cited and the Court has found no persuasive judicial authority adopting such an approach. This Court is not inclined to embark upon this pioneering endeavor for a number of reasons, not the least of which is a reluctance to lead the federal courts yet further into the nettlesome wonderland of arithmetical abstractions and judically unmanageable standards which has been so aptly described as a "political thicket". *Colegrove v. Green*, 328

U.S. 549, 556 (1946) (opinion of Frankfurter, J.). In any event, plaintiffs produced no evidence on this point, and made no attempt to demonstrate what degree of malapportionment, if any, results from Prairie View students voting in counties other than Waller. Therefore, because of the dearth of supportive authority and the absence of an evidentiary record, the malapportionment argument must be rejected.

(VIII) For the foregoing reasons, judgment shall enter for defendants.

(IX) To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

The Clerk shall send copies of this Memorandum and Order to all counsel. Counsel for defendants shall submit a proposed form of judgment consistent with the foregoing, after approval as to form by opposing counsel.

DONE at Houston, Texas, this 29th day of March, 1972.

/Signed/ James Noel

Judge

FOOTNOTES

[1] Prior to 1971, a similar, though shorter, form was used for this purpose.

[2] The questionnaire has a space for the applicant's name and address, and then inquires: Are you a college student? If so, where do you attend school? How long have you been a student at such school? Where do you live while in college? How long have you lived in Texas? In Waller County? Do you intend to reside in Waller County indefinitely? How long have you considered yourself to be a bona fide resident of Waller County? What do you plan to do when you finish your college education? Do you have a job or position in Waller County? Own any home or other property in Waller County? Have an automobile registered in Waller County? Have a telephone listing in Waller County? Belong to a Church, Club or some Waller County organization other than college related? If so, please name them. Where do you live when the college is not in session? What address is listed as your home address with the College? Give any other information which might be helpful.

At the end of the questionnaire, there are spaces for the date and the applicant's signature.

[3] On cross-examination, each of plaintiffs testified that he had not represented to college officials that he resided elsewhere than Prairie View. On rebuttal, defendants introduced properly authenticated copies of the "assignment card" of each plaintiff containing the representations as to home address alluded to in the text above. Although this Court is reluctant to attribute intentional falsehood to any witness, suffice it to say that plaintiffs' credibility was severely shaken.

[4] The Article 5.08 cited with approval by the Court in *Carrington* was amended in 1967. The rebuttable presumption of non-residency, as applicable to students, remained substantially the same. The former statute provided that "(t)he 'residence' of a single man is where he usually sleeps at night; that of a married man is where his wife resides, or if he be permanently separated from his wife, his residence is where he usually sleeps at night; provided, that the residence of one .... who is a student of a school, college, or university, shall be construed to be where his home was before he became such .... student, unless he has become a bona fide resident in the place where he is .... such student. . . ."

[5] See, e.g., *Anderson v. Brown*, 332 F.Supp. 1195 (S.D. Ohio 1971) (per curiam); *Bright v. Baesler*, C.A. No. 2249, 40 U.S.L.W. 2408 (E.D. Ky. 1971); *Kennedy v. Meskill*, C.A. No. 14,548 (D.Conn. 1971); *Phillips v. Bing*, C.A. No. 71-234-D (E.D. Ill. 1972).

Bright, Kennedy and *Phillips* involved discriminatory misapplication of residency statutes by local officials. The Ohio statute involved in *Anderson* applied to a particularly severe standard of students which, unlike the Texas statute, approached absolute disfranchisement. In any event, as noted in the text above, none of these cases deals satisfactorily with *Carrington*. By contrast, in at least one student voting case the District Court recognized the significance of *Carrington* and reached what this Court deems to be the correct result. *Whittington v. Board of Elections for Onondaga County*, 320 F.Supp. 889 (N.D. N.Y. 1970).

Charles R. BALLAS, Plaintiff,

v.

LeRoy E. SYMM, Defendant.

Civ. A. No. 72-H-1377.

United States District Court,
S. D. Texas,
Houston Division.
Nov. 13, 1972.

Action by college student seeking to register to vote. The District Court, Noel, J., held that action could not be maintained as class action and was proper case for exercise of abstention but court would grant relief to individual plaintiff.

Order accordingly.

1. Federal Civil Procedure – Key No. 161

Where because of proximity of election requested relief could not be granted to entire class, case was moot as far as entire class was concerned and could not be maintained as class action. Fed. Rules Civ.Proc. rules 23, 23(a)(2), (c), (c)(1), 28 U.S.C.A.

2. Federal Civil Procedure – Key No. 165

Where issues common to all members of class had already been decided by court, court would not permit action to be maintained as class action. Fed. Rules Civ.Proc. rules 23, 23(a)(2), (c), (c)(1), 28 U.S.C.A.

3. Federal Civil Procedure – Key No. 161

If requested relief for class cannot be provided by decision favorable to plaintiff, case must be considered moot. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

4. Statutes – Key No. 184,223.1

Court which is called upon to interpret provision of election code must give most serious consideration to related provision of Constitution and laws, and design and purpose of legislature in enacting code. V.A.T.S. Election Code, art. 5.08(k).

5. Elections – Key No. 19

Only reasonable relationship to state interest in determining true residence of voter registrants is necessary to uphold procedure for determining residency. V.A.T.S. Election Code, art. 5.08(k).

6. Elections – Key No. 106

All rules for determining residency must be considered in making determination of residence of voter registration applicant. V.A.T.S. Election Code, arts. 5.08, 5.08(k).

7. Elections – Key No. 19

Determination of whether student seeking to register as voter has changed domicile is matter to be determined under local law and is solely of state concern. V.A.T.S. Election Code, art. 5.08(k).

8. Elections – Key No. 76

Term "indefinitely" as used in statute requiring that student seeking to register as voter must show that he intends to make place his home indefinitely should not be equated with permanent. V.A.T.S. Election Code, art. 5.08(k).

See publication Words and Phrases for other judicial constructions and definitions.

9. Constitutional Law – Key No. 48(1)

Where alternative constructions of legislation are possible, interpreting court must adopt explanation which will uphold the provision.

10. Elections – Key No. 19

Requiring student to fill out questionnaire in connection with his voter's registration in order to enable registrar to determine residency was reasonable exercise of state's right and duties under powers reserved to it under Federal Constitution. V.A.T.S. Election Code, art. 5.08(k); U.S.C.A.Const. Amend. 14.

11. Constitutional Law – Key No. 47
Elections Key No. 103

Interpretation of case by chief election officer of state was in excess of his authority and bulletin from such officer to county registrars prohibiting county registrars from requiring affidavits or questionnaires was not competent evidence to support student's claim that statute providing for questionnaire and use of questionnaire by local registrar violated equal protection clause. V.A.T.S. Election Code, art. 5.08(k); U.S.C.A. Const. Amend. 14.

12. Elections Key No. 12

Civil Rights Act of 1964 clearly aims at eliminating racially motivated practices which restrict exercise of elective franchise. 42 U.S.C.A. §1971.

13. Elections – Key No. 112

Where it was clear that suits commenced by Attorney General related to cases of racial discrimination in exercis-

ing right to vote, it was logical to conclude that Civil Rights Act applied only to cases of racial discrimination. 42 U.S.C.A. §§1971, 1971(a), (a)(1), (2)(A-C), (3), (e).

14. Civil Rights – Key No 13.1

Congress would not have intended broader application of Civil Rights Act to individuals suing to enforce their voting rights than to Attorney General. 42 U.S.C.A. §§1971, 1971(a), (a)(1), (2)(A-C), (3), (e).

15. Elections – Key No. 112

Civil Rights Act provision relating to voting rights did not apply to action by student attacking procedure used by local registrar to determine residency. 42 U.S.C.A. §1971; V.A.T.S. Election Code, art. 5.08(k).

16. Elections – Key No. 112

Evidence in student's action attacking procedure used by local voting registrar for determining residency failed to establish that procedure stemmed from any racial discrimination. 42 U.S.C.A. §1971; V.A.T.S. Election Code, art. 5.08(k).

17. Courts – Key No 260.4

Action by student attacking procedure used by local voter registrar to determine residency was proper case for exercise of doctrine of abstention. V.A.T.S. Election Code, art. 5.17.

18. Mandamus – Key No. 12

Mandamus is appropriate only where state official has failed to perform a nondiscretionary act, or has clearly abused his authority in a discretionary matter.

19. Mandamus – Key No. 3(1)

Mandamus is unavailable where alternative means of obtaining review of official's action are provided.

20. Mandamus – Key No. 3(8)

Where state procedures for review of rejection of voter registration were available mandamus was inappropriate.

21. Courts – Key No 260.4

Although court held that student's action attacking procedures used by voter registrar for determining residency could not be maintained as class action and was appropriate case for abstention, in view of nearness of election, court was under duty to determine whether student was entitled to individual relief.

22. Elections – Key No. 106

Failure of voter registrar to afford voter registrant a hearing before rejecting his application was improper.

23. Elections – Key No. 106

Where voter registrar advised registrant of his right to appeal, registrar was also under duty to notify registrant of his right to hearing before exercising right of appeal. V.A.T.S. Election Code, art. 5.17a(1).

24. Constitutional Law – Key No 274(2)

Failure of voter registrar to afford registrant hearing on rejection of his registration deprived registrant of due process. U.S.C.A. Const. Amend. 14.

25. Elections – Key No. 109

Where deputy voter registrar did not prepare lists as required by law, applications for registration in possession of such deputy were void. V.A.T.S. Election Code, arts. 5.13a(1, 4), 5.20a.

26. Elections – Key No. 112

Notwithstanding court held that student's action attacking procedures for voter's registration could not be maintained as class action and was proper case for abstention, court would grant relief to individual plaintiff where registrar did not advise him of his registration and it appeared that defects in registration could have been cured.

Michael Anthony Maness, of Maley & Friedman, Houston, Tex., for plaintiff.

Will Sears and David F. Beale, of Sears & Burns, Houston, Tex., for defendant.

SUPPLEMENTAL AND AMENDED MEMORANDUM AND ORDER

NOEL, District Judge.

On October 12, 1972, plaintiff Charles R. Ballas, a white male student whose parents reside in McKeesport, Pennsylvania, filed his complaint alleging violations of his constitutional and statutory civil rights by defendant LeRoy E. Symm, the Tax Assessor-Collector of Waller County, Texas. In particular, plaintiff Ballas individually complains of defendant Symm's practice of requiring students who seek to register as voters in Waller County to complete what he denominates as a Questionnaire Pertaining to Residence, referred to herein as questionnaire.

Defendant, in the performance of his statutory duties, utilizes these questionnaires as an aid in determining

whether an applicant is a bona fide resident of Waller County. Plaintiff alleges that this practice, which is not required of non-students, is a constitutionally impermissible deprivation of his federal civil rights in contravention of the Fourteenth Amendment, the Civil Rights Act of 1965, 42 U.S.C. §1971, and the Civil Rights Act of 1871, 42 U.S.C. §§1983, 1988. Plaintiff also contends that he is undoubtedly a bona fide resident of Waller County, Texas, and should be registered to vote there.

In addition to his individual claim, plaintiff seeks to maintain his action as a class action, F.R.Civ.P. 23, on behalf of a class defined as "all persons who are qualified electors under the Constitution and laws of the State of Texas and who, being so qualified, made application to defendant for a voter registration certificate in accordance with the laws of the State of Texas but were denied such certificate because in determining their ineligibility for such a certificate, defendant (or other authorized public employees or officials acting at defendant's direction or instruction) applied to such persons any standard, practice or procedure different from the standards, practices or procedures applied under color of law to other individuals within Waller County, Texas who have been found by defendant to be qualified to vote in that county." (Plaintiff's Complaint, p. 2.)

Plaintiff seeks injunctive and declaratory relief, in particular:

(1) an order declaring the case to be a proper class action [F.R.Civ.P. 23(c)(1)];

(2) a declaratory judgment decreeing that defendant's acts have deprived plaintiffs of rights, privileges and immunities;

(3) a preliminary and permanent mandatory injunction directing defendant immediately to issue to each plaintiff a valid Texas voter registration certificate;

(4) an award of $1,000 in attorneys fees; and

(5) general relief, to wit, "such further relief as the Court may deem just and equitable under the circumstances."

At pretrial hearing held October 24, the Court heard testimony of plaintiff relative to his claim of residency in Waller County. At that time defendant interposed a motion to dismiss on several grounds. Defendant's motion was later reduced to writing, supported by brief, and has been carried with the case to this point.

On October 30, the Court held a hearing on plaintiff's request for a preliminary injunction. Plaintiff presented testimony from the defendant, Deputy Registrar of Waller County Eristus Sams, and the plaintiff. At hearing the Court suggested that the case was not properly a class action. The Court also suggested that since state court relief was appropriate and available to individual applicants denied registration, a federal court should abstain from decision. Finally, the Court expressed the view that the individual plaintiff, Ballas, presented an appealing claim to bona fide residency.

On November 3, testimony resumed with the defendant presenting his case. Mrs. Linda Wallingford, a deputy county clerk, the Honorable Jack Taylor, Waller County Judge, and defendant Symm testified for defendant. At the close of testimony, the Court announced it would render its decision in open court on Monday, November 6, 1972, 9:30 a. m.

1. *Procedures Regarding Movement of the Case*

In his pleadings and motions, and orally at each of the hearings, plaintiff through his attorney in charge, has expressed impatience and dissatisfaction with the movement of the case. The attorney is a young, inexperienced

lawyer, not heretofore admitted to practice in this Court. The latter fact did not become known to the Court at or before the pretrial hearing of October 24, although under the requirements of Rule 1.E. of the Local Rules of this Court, the attorney should have obtained leave of the Court to appear before filing plaintiff's complaint. For the purposes of this case only, the attorney was admitted at the hearing on October 30.

Certain findings of the Court concerning certain procedural matters are contained in a separate writing prepared and filed on November 6, 1972. This was done in order to shorten the text of this Supplemental and Amended Memorandum and Order for publication. They are incorporated herein and made a part hereof, from which I turn to the dispositive aspects of the case.

2. *The Class Action*

An important procedural question is whether the case is properly a class action within the meaning of F.R.Civ.P. 23. Plaintiff focuses on the questionnaire used by defendant as an aid for determining residency and views its constitutionality as the dispositive issue, and thus urges the "questions of law or fact common to the class." F.R.Civ.P. 23(a)(2). Defendant views the issue as one of determining on an individual basis the residence of each applicant for registration and therefore as to each member of the class as

such is defined by plaintiff. In that regard, defendant urges that the facts surrounding the residency of each applicant differ, which prevents the presence of common questions of fact requisite to maintenance of the case as a class action. Manard v. Miller, 53 F.R.D. 610 (E.D.Va.1971) aff'd 405 U.S. 982, 92 S.Ct. 1253, 31 L.Ed.2d 449 (1971).

[1, 2] Two factors prevent the Court from considering this case an appropriate class action. First, because of the proximity of the election, the requested relief could not be granted to the entire class at this late date. The case is therefore moot as far as the entire class is concerned. Secondly, the constitutionality of the questionnaire and the supporting statute, Texas Election Code, Art. 5.08(k), V.A.T.S., the issues common to all class members, have already been decided by this Court in Wilson v. Symm, 341 F.Supp. 8 (S.D.Tex.1972). That decision is clearly res judicata to at least six members of the proposed class here.

A. *Class Action Barred by Mootness*

The first ground upon which the Court must decline to entertain a class action in this case is mootness. Defendant strongly urges that plaintiff's claim is mooted because absentee voting began on October 18. Defendant claims that insufficient time remains to provide the relief requested for the plaintiff class.

Mootness is a very practical concept. Events may transpire resolving a dispute such that a judicial decision will not affect the position of the parties. Such cases present no justiciable controversy and must be dismissed. E. g., Munoz v. Amador, 340 F.2d 590 (5th Cir. 1965).

[3] The test for mootness is whether the class can be given the substantial relief sought for it by plaintiff. If the

requested relief for the class cannot be provided by a decision favorable to plaintiff, the case must be considered moot. Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895).

Plaintiff's claim would unquestionably be mooted had the November 7 election, the last election of the year, already taken place. United Public Workers v. Mitchell, 330 U.S. 75, 88, 67 S.Ct. 556, 91 L.Ed. 754 (1946). Defendant contends that with the start of absentee balloting, the election is and has already begun, as a result of which plaintiff's claims are moot. Skelton v. Yates, 131 Tex. 620, 119 S.W.2d 91 (1938); Sterling v. Ferguson, 122 Tex. 122, 53 S.W.2d 753 (1932).

The Texas Election Code is a comprehensive, statutory enactment which applies to all elections and primaries held in the state.

Under the Code, the Tax Assessor-Collector and the County Clerk have extensive functions which must be performed before an election day. The Tax Assessor-Collector must prepare current lists of voters at least 20 days before the election and again four days before election. Article 5.19a. In addition to the alphabetical master list, he must provide each of the thirteen precinct judges with lists of the voters in their respective precincts. Finally, the defendant Registrar must maintain current records of deaths, felony convictions, and adjudications of incompetency, Article 5.18b, subd. 5.

The work of the County Clerk begins upon receipt of the voter lists. The Clerk must order the ballots from the printer. From time of order, it takes a minimum of ten days for the ballots to be printed and delivered to the

County Clerk. After receipt, the Clerk must check them for accuracy and count them. The Clerk must prorate the ballots among the various precincts. Finally, three days before election day, the Clerk must cause the ballots and election supplies to be delivered to the precinct judges by the County Sheriff.

The population of Waller County is not large. Only 6,845 ballots have been ordered for this general election. The staffs of the County Clerk and the Tax Assessor--Collector are small. Experienced volunteers in sufficient numbers are not available for registering and providing ballots for 1,500 to 2,500 additional voters in a short period of time.

In view of the above facts, the Court accepts as true defendant's statement that his office could not register the plaintiff class in time for the General Election if ordered to do so on November 3, the date hearing on preliminiary injunction was concluded. In addition, based on the evidence presented, the Court finds that an injunctive order issued on October 24 probably could not have been followed or enforced without disruption of the November 7 election. See Polk v. Davidson, 145 Tex. 200, 196 S.W.2d 632 (1946). October 24 was the date of the pretrial hearing in this case and was before plaintiff had amended his answer to request a preliminary injunction. In this situation, refusal of the plaintiff's request for injunctive relief on behalf of the class is clearly appropriate. Garza v. Smith, 320 F.2d 131 (5th Cir. 1970).

The Congress of the United States as reflected by 42 U.S.C. §1973aa-1, and the Supreme Court of the United States in Dunn v. Blumstein, 405 U.S. 330, 345, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) and Oregon v. Mitchell, 400

U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), have recognized that the strong need to prevent election fraud justifies closing registration 30 days before an election. That same strong state interest, fully explained hereinafter, compels this Court's decision to dismiss a class action seeking to register a minimum of 1,500 people (and possibly 2,500 people) at this late date. That number could not have been registered subsequent to the filing of this lawsuit without inviting frustration of the provisions of the Legislature of the State of Texas for the *prevention of election fraud.*

Plaintiff suggests that Hamer v. Campbell, 358 F.2d 215 (5th Cir.) cert. denied 385 U.S. 851, 87 S.Ct. 76, 17 L.Ed.2d 79 (1966), holds that the lateness of plaintiff's claim cannot be considered here. The Fifth Circuit has acknowledged that the extraordinary relief granted in *Hamer* is justified only by an exceptional factual situation. Mississippi Freedom Democratic Party v. Democratic Party, 362 F.2d 60 (5th Cir. 1966). It is sufficient to note that here, unlike *Hamer*, all the equitable considerations do not repose with plaintiff.

On August 28, 1972, plaintiff prepared and mailed his application for a voter registration certificate. In prompt response, defendant sent him a questionnaire. Defendant requested its completion and return for further examination before certificate could issue. Plaintiff knew his application might be rejected, but he waited until October 5 or 6 to return the completed questionnaire, only one or two days before the close of registration. Suit was filed on October 12, five days after registration had closed. Service on defendant was not effected until October 18, the day absentee voting began. Plaintiff's attorney requested and was issued the standard summons which as provided by

law gave defendant 20 days to file an answer. Under the summons defendant's answer would not have been required until November 7, election day. Thus, in a situation where time was critical, both plaintiff and his attorney failed to act with requisite diligence and speed. In so finding, this Court does not imply that a state court could not entertain the claim of a single voter for relief under Article 5.17a, even though it should be filed after the close of registration. Plaintiff so contends but this Court, finding it unnecessary and a question of state law, expresses no opinion in this regard at this point.

B. *Class Action Barred by Res Judicata*

This is not the first litigation involving this questionnaire, as put in the factual frame of reference by plaintiff's complaint, motions and briefs. On March 29, 1972, by Memorandum and Order, this Court decided the case of Wilson v. Symm, 341 F.Supp. 8 (S.D. Tex. 1972). That case was filed December 15, 1971 on behalf of seven named students from Prairie View A & M University (two of whom withdrew before trial), a young people's political association, and a corporation which engages in "public interest litigation." The Court was informed that the able counsel who appeared were provided by the American Civil Liberties Union. Wilson v. Symm also concerned the questionnaire used by defendant Symm as an aid to determining residency of applicants for voter registration. Mr. Ballas' attorney, by pleadings, briefs and in open court, quite candidly admitted that he is seeking a late reconsideration of this Court's decision in *Wilson*. Although a different named plaintiff and a different attorney are here involved, the defendant and the constitutionality of defendant's use of the questionnaire complained of are identical to plaintiff's complaint in *Wilson*.

Even accepting the premise that a second lawsuit by another plaintiff is not barred by res judicata, this class action must be. The purely legal question of the questionnaire's constitutionality was posed and answered in *Wilson*. That decision applies directly to the five named plaintiffs and has precedential effect on the claims of all class members here. Indeed, if they are still at Prairie View A & M University, the five plaintiffs in *Wilson* are members of the alleged plaintiff class here. This demonstrates the inappropriateness of allowing a class action to challenge practices which the individual members have already unsuccessfully litigated.

C. *The Constitutional Claims of the Class*

With regard to the constitutionality of the questionnaire, plaintiff refers the Court to two events occurring subsequent to the decision in Wilson v. Symm; first to the case of Whatley v. Clark, Civil Action No. 5474 (E.D.Tex. October 2, 1972), and secondly, to a bulletin issued by the Honorable Robert Bullock, Secretary of State of the State of Texas, also under Texas law its Chief Election Officer. Neither event mandates a conclusion contrary to that reached in *Wilson*, for reasons which follow.

(1.) *Wilson v. Symm and Whatley v. Clark Compared*

Whatley v. Clark is not precedential authority here for a number of reasons. With deference and respect for the opinion of the distinguished Judge who decided *Whatley*, but consistent with *Wilson*, I hold the opposite view on the merits of the matter. It is not infrequent that two lower federal courts reach an opposite result. In my opinion, Art. 5.08(k) is not unconstitutional in any respect. It was my intention to so hold in *Wilson*. But, since plaintiff has

urged reconsideration of *Wilson* and the Court in *Whatley* distinguished *Wilson*, I shall give the reasons which lead me (1) to reiterate my holding in *Wilson*, and (2) not to accept the rationale of *Whatley*. While facially distinguishable, *Whatley* and *Wilson* are not distinguishable in principle.

For the purpose of clarity only, and with no intention to make an unseemly comparison, I shall point out the particulars, wherein and why, I am not in agreement with *Whatley*.

[4] A court which is called upon to interpret a provision such as 5.08(k) must give most serious consideration to related provisions of the Constitution and laws, and the design and purpose of the Legislature in enacting the Code. See Flemming v. Nestor, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). Extracted language, words and sections of a statute which may not be self-explanatory assume a more precise meaning when considered in such light. It is spectacularly so with Article 5.08(k).

Suffrage, the qualification of voters, and conduct of elections for the protection of the purity of the ballot have been a continuing basic concern of the people of Texas since the formation of the Republic, evidenced by the first and each succeeding constitution, as well as the extensive enactments of its Legislature. See Sections 1-5, Article VI, and Article XVI, Section 2, Constitution of the State of Texas, Vernon's Ann.St., together with Interpretative Commentary following each section; and the Texas Election Code, supra. An example of the attitude of the people of Texas with respect to the purity of the ballot as a compelling state interest is forcibly expressed in Sec. 4, Art. VI, supra, as follows:

§4. *Elections by ballot; numbering, fraud and purity of elections; registration of voters*

Sec. 4. *In all elections by the people the vote shall be by ballot and the Legislature shall* provide for the numbering of tickets and *make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box* and the Legislature may provide by law for the registration of all voters in all cities containing a population of ten thousand inhabitants or more. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

Wilson and *Whatley* each recognizes that *any exclusion* from the franchise must be necessary to promote a compelling state interest. In *Wilson*, as here, plaintiffs contended Art. 5.08(k) singled out students for special treatment in determining residency, in the absence of a compelling state interest. Plaintiffs there, as here, equated such action with an exclusion of the franchise. In *Wilson* this Court found such equal protection attack to be fully answered by Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). The equal protection attack in *Whatley* was the same as in *Wilson*, but the focus of *Whatley* was on (i) the word "indefinite", and (ii) the failure of defendants to support the result by demonstrating any compelling state interest. (It is obvious that the judge in *Whatley* had some reservation about such apparent lack of such state interest. It would appear that in *Whatley* the court was without assistance or enlightenment from counsel *on the law* in this regard.)

In testimony quoted by the Court in *Whatley*, the Secretary of State and Chief Election Officer Mr. Bullock denied the existence of "purity of the ballot" as a compelling state interest, and in fact found no administrative justification for the special provisions contained in

Art. 5.08(k) as a means of preventing vote fraud, and said 5.08(k) created an inconvenience in absentee voting for the County Clerks and student absentee voters. Very potent testimony, but under the law and facts here, it would be more appropriately addressed to a Texas legislative hearing. The opinions of the Chief Election Officer would be entitled to respect and weight in an appropriate cause, but where as here, the legislative intent is clearly ascertainable from the applicable provisions of the Texas Constitution and laws, such opinion becomes irrelevant.

It is not clear whether Bullock's testimony was offered by plaintiffs or defendants. However, *Whatley* found that "Defendants . . . *apparently* rely on no compelling state interest . ." and that *Bullock* expressed the opinion that 5.08(k) was passed "to discourage students from voting." (Emphasis added.) Bullock left no doubt that *he was unsympathetic with the enforcement of 5.08(k)*. Confronted as he was with the contentions of defendants and the Bullock testimony, it is not surprising that the busy *Whatley* court was led into the result reached in *Whatley*.

[5] The Court rejects the contention made by plaintiff here that the wrong judicial test was applied in *Wilson* and that the "necessary to effect a compelling state interest" standard must be used. Only a reasonable relationship to the state interest in determining true residence is necessary. See Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970).

I turn now to how the Texas Election Code reflects an intent to promote a compelling state interest, through Art. 5.08 and its component Art. 5.08(k) and related provisions.

The design and purpose of the Code is expressed at the outset, in pertinent part as follows:

> *Article 1.01 Design of the Code*
>
> The *aim* in adopting this Code is to state in plain language the laws governing the nomination and election of officers and of holding other elections, *to simplify, clarify and harmonize the existing laws in regard to parties, suffrage, nominations, and elections, and to safeguard the purity of the ballot box against error, fraud, mistake and corruption, to the end that the will of the people shall prevail and that true democracy shall not perish from the Lone Star State.* To that end the provisions of this Code shall apply to all elections and primaries held in this State, except as otherwise provided herein. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 1.

Chapter 5 of the Code is entitled Suffrage. While not exclusively so, it contains the provisions which detail the immediate background for the interpretation of 5.08(k). These demonstrate a legislative intent to identify each "qualified voter" and to provide the manner of his or her voting, to the end that error, fraud, mistake and corruption may be prevented in the election process.

Article 5.02, as amended in 1966, 1967 and 1968, entitled "Qualification and requirements for voting," now provides in pertinent part as follows:

> *Art. 5.02 Qualification and requirements for voting*
>
> Every person subject to none of the foregoing disqualifications . . . who shall have resided in this state . . . within the district or county in which such person offers to vote, and who shall have registered as a voter, shall be deemed a qualified elector. No

person shall be permitted to vote unless he has registered in accordance with the provisions of this code.

Having thus made "residence" a vital requirement for every applicant to qualify as a voter, the Legislature has said that legal residence (i. e., domicile) determines the place where one registers to vote. Art. 5.10a, as amended, Sec. 42a, Appendix to Chapter 5.

Having made residence a prerequisite to voter registration and having established the precinct in which to register, quite logically, the Legislature has also made provision for proof of residence by an applicant to the "county collector" (Registrar), if required by him, as follows:

Art. 5.21 Proof of residence

If the county collector has reason to believe that one who applies to pay his poll tax or secure his certificate of exemption from its payment, *has falsely stated* his age, occupation, precinct of his residence, or length of his residence in the State, county and city, or *any* other *matter touching his qualifications to vote, he shall require proof of such statement*; and, if on inquiry, he is satisfied that said person has sworn falsely, he shall make a memorandum of the words used in such statement, and present the same to the foreman of the next grand jury of if the County Collector does not personally know one who applies to pay his poll tax or secure his certificate of exemption from its payment as being a resident in the precinct which such person claims as that of his residence, it shall be the duty of such collector to require proof of such residence or of such other facts

as may be necessary. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 53.[1]

Further provision for such proof to the registrar is made in Art. 5.17a entitled "Challenge of registration; appeal," which provides in part as follows:

> *Art. 5.17a Challenge of registration; appeal*
>
> (1) Challenge of applicant. *Any person applying for registration may be challenged by the registrar or deputy taking his application or by any registered voter of the county.*
>
> (2) Challenge of registered voter. *Any registered voter shall have the right to challenge the registration of any other registered voter in his county* by filing with the registrar of voters a sworn statement setting out the grounds for such challenge. . . .
>
> (3) Jurisdiction of district court; trial of appeal. The district courts of this State shall have jurisdiction to hear and determine appeals from decisions of the registrar refusing an application for registration and from decisions of the registrar either canceling or refusing to cancel a registration. . . .

The Legislature's manifest concern for maintaining purity of the ballot is emphasized by subsections (1) and (2) of Art. 5.17a. In a very simple but effective way, provision is made for citizen participation in protecting purity of the ballot. This is directly related to residence, for whoever is a qualified voter in a particular precinct becomes of vital importance to every other voter in such precinct in any election other than a county-wide election. Examples of such which this Court will judicially notice are party precinct committeemen; justices of the peace;

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[1] Because the poll tax was held unconstitutional, it has been supplanted by the voter registration certificate.

constables; state senators and representatives; and, congressmen in counties which embrace more than one congressional district. Correct delineation of precinct lines and restricting the suffrage to those residents in the precinct as defined, is the only reasonable and fair way of having such public officials elected by those whom they are elected to represent.

With residence, the determination of residence, and location of residence having been made so vital to the voting process, guidelines for interpretation of residence were needed for the 254 registrars in Texas. Certainty and uniformity caused the Legislature to promulgate the rules for such determination. Without such rules the 254 registrars in Texas would be without the requisite guidelines.

[6] In 1967 and 1971, the Legislature amended Art. 5.08, which was originally designed for such guidance. It is now denominated "Rules for determining residence," and contains 13 paragraphs, of which Art. 5.08(k) is only one. All must be read and considered in making any determination of residence of a student applicant or voter because and for example, any student must also be single or married, male or female, etc.; and, may also come under other categories of Art. 5.08.

[7] Article 5.08(k) first requires that if a student desires to vote in the place where he attends school, he must in fact be a bona fide resident of such place. Such requirement of bona fide residence is uniform for all citizens. But, Art. 5.08(k) contains a rebuttable presumption to the effect that a student applicant's residence shall be constructed to be where his home was before he became such student. This is an ever so slight veneer or

guide for determining residence (domicile). In determining domicile at common law, a change from one domicile to another requires proof. Together with physical removal of a person, there must be an accompanying intent to change domicile. Otherwise, the body will have moved, but the domicile will have remained where it was next in time prior thereto. This is solely a matter to be determined under rules of local law; it is solely of state concern.

[8] Secondly, 5.08(k) provides that in showing the bona fides of his claim to residency where he attends school, a student must show that "he intends to remain there and to make that place his home *indefinitely* after he ceases to be a student.[2]" Indefinitely is the key word for examination.

"Indefinitely" is a simple, well understood word. For the definition, one need not turn to an unabridged dictionary. The following definitions are from Webster's Seventh New Collegiate Dictionary, 1970:

> definite—having distinct or certain limits; precise.
> indefinite—not precise; vague; having no exact limits.

As contrasted with "permanent," the latter is defined in the same dictionary as follows:

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[2] Although the questionnaire inquires of an applicant as to whether he intends "to reside in Waller County indefinitely," in his decisional process defendant Symm does not consider that question solely dispositive of the issue of bona fide residency with respect to any application. For example, defendant testified that, if a University student is from the Hempstead area, he is considered a resident without regard to his intentions upon graduation. Similarly, a married student will be considered a resident, irrespective of his answer to the question.

permanent—continuing or enduring without fundamental or marked change.

The synonym noted in the dictionary for "permanent" is "lasting":

lasting—existing or continuing a long while.

The distinction between "indefinite" and "permanent" *in the context of time* has been stated with precision by the Supreme Court of Florida, as follows:

> Indefinite is more synonymous with 'temporary' than with 'permanent' for it contemplates that the condition will end at an unpredictable time, whereas 'permanent' does not contemplate that the condition will cease to exist. Twisdale v. Womack & Martel, Fla., 148 So.2d 21, 23.

The etymology of the words, and correct grammar as well, demonstrate that "indefinite" should not be equated with "permanent.[3]"

[9] Moreover, the applicable rules of statutory construction lead to an opposite result. Where alternative constructions of legislation are possible, an interpreting court must adopt the explanation which will uphold the provision. Anniston Mfg. Co. v. Davis, 301 U.S. 337, 351, 57 S.Ct. 816, 81 L.Ed. 1143 (1937). By interpreting indefinite to mean permanent, *Whatley* would require

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[3] A three-judge United States District Court sitting in New Hampshire, in Newburger v. Peterson, 344 F.Supp. 559 (N.H.1972), cited in *Whatley*, also equated indefinitely with permanently. It being my view that Art. 5.08(k) is predicated upon and consistent with such compelling state interest, I will omit any discussion of Newburger v. Peterson.

students to make proof of their intention for a much longer duration than actually intended by the Legislature, when it said and meant indefinite. In so doing, *Whatley* found 5.08(k) to constitute an exclusion of the franchise, an unconstitutional result. Even if equating indefinite with permanent were an acceptable interpretation, the duty of the Court in applying the above-mentioned canon would be to accept the interpretation or definition of "indefinite" which would uphold the constitutionality of 5.08(k) and to reject equating it with "permanent." In contrast, by applying the latter definition of "indefinite," Whatley found Art. 5.08(k) to be constitutionally defective.

Much more could be said, but the foregoing must suffice to demonstrate that residence is the most vital criterion of the Code for determining who may vote and where. It is common to all who would vote. It is not a creation of the Legislature either to enfranchise, or disenfranchise, students as such. Any qualified student voter, *like any other qualified voter*, may exercise his franchise in the precinct and county *of his bona fide residence*. Art. 5.08(k) simply specifies in a reasonable manner two criteria which among others shall govern the determination of such bona fide residence—(i) the rebuttable presumption treated here and in *Wilson*; and (ii) an intent of applicant to remain at the place he is attending school indefinitely after he ceases to attend school. Art. 5.08(k) is not self-contained and exclusive. All other applicable criteria contained in Article 5.08 must be given appropriate consideration in determining the bona fide residence of any particular student applicant or voter.

[10] The State of Texas has a compelling state interest in suffrage, nominations, and elections to safeguard the

purity of the ballot box against error, fraud, mistake and corruption. The Legislature has determined that Art. 5.08 in its entirety is necessary for the promotion of this state interest. I agree. It is a reasonable exercise of the state's right and duties under powers reserved to it under the federal constitution. By effectuating such compelling state interest insofar as it utilized Art. 5.08(k), the State has not violated in any sense whatsoever any right of any plaintiff identified in *Whatley*, *Wilson*, or *Ballas*, guaranteed him under the Equal Protection Clause or under any other provision of the federal constitution.

(2.) *The Bullock Bulletin*

Whatley was decided October 2, 1972. On October 3, the Secretary of State of the State of Texas, as Chief Election Officer (Mr. Bullock), issued a bulletin which advised that "No county registrar may require any affidavits or questionnaires in addition to the information required on the application for a voter registration certificate," citing as authority Whatley v. Clark. October 7 was the last date for the issuance of registration certificates. On October 5, after conferring with his counsel, defendant Symm informed Bullock by letter of his intention to follow the ruling in Wilson v. Symm and to continue to apply Article 5.08(k).

As a legal interpretation of a judicial decision, the Secretary's bulletin is *clearly erroneous*. As above mentioned, *Whatley* held only that the "intent to remain indefinitely" portion of Art. 5.08(k) was invalid. Despite the express language of the *Whatley* Court to the contrary, Bullock interpreted *Whatley* to mean that *all* of 5.08(k) was unconstitutional, not just the "indefinitely" provision. Bullock was a party to Wilson v. Symm. He answered and

was represented at all hearings and trial by an Assistant Attorney General of Texas. Bullock's counsel approved in writing the judgment of this Court based upon its Memorandum and Order of March 29, 1972, awarding judgment to defendants in which the Court found:

> Accordingly, this Court concludes that Article 5.08(k), on its face and as applied by defendant Symm, does not violate the Equal Protection Clause of the Federal Constitution. 341 F.Supp. 8, 17 (1972).

For some reason, not explained in the testimony of Bullock contained in *Whatley*, or offered by plaintiff here, Bullock chose to ignore the opinion of this Court in Wilson v. Symm and to rely solely on *Whatley*.

Apart from the constitutional question, the exchange of correspondence between Bullock and Symm presents a question of state law. The question is whether the Secretary's power to obtain election law uniformity among the counties includes power to make binding determinations of state law. If the Secretary's authority should extend that far, then Symm as a state official should follow the Secretary's bulletin regardless of its correctness. If the Secretary does not have such power, his bulletin must be considered merely advisory and thus defendant Symm who as an elected official with express authority and duty under the Texas Election law, has the authority and duty to make an independent assessment of the election law.

Apparently, there is no disagreement between the parties here as to the Secretary's authority. Plaintiff admits that the Secretary's opinions are unenforceable at law and

are not binding. The Secretary acted well within his authority in bringing the *Whatley* case to the attention of the county Tax Assessor-Collectors, but clearly repudiated the position taken by him in this Court in Wilson v. Symm, as well as the judgment in Wilson v. Symm, which was favorable to Bullock and consistent with his contentions, as well as approved by his counsel in the case. The limitations on the Chief Election Officer's authority are discussed in Bullock v. Calvert, 480 S.W.2d 367, 370 (Tex.1972).

[11] The bulletin was offered in evidence by plaintiff Ballas and urged in his brief to be evidence of the contemporary construction of 5.08(k) by the Texas Chief Election Officer. Because of the facts reviewed above, I find such Officer's construction of 5.08(k) to be utterly lacking in candor or credibility; legally incorrect; misleading; in excess of his statutory authority; and, irrelevant. Therefore, the bulletin is not competent evidence to support plaintiff's contention that Art. 5.08(k), and use of the questionnaire by Symm violate the Equal Protection Clause of the Fourteenth Amendment.

D. *Applicability of the Civil Rights Act of 1964 to the Class*

In addition to averments of unconstitutionality, plaintiff claims that defendant's procedure violates Subsection (a)(2) of §1971, Title 42, U.S.C., a part of the Civil Rights Act of 1964. That same claim was originally made by plaintiffs in Wilson v. Symm; however, their final amended complaint deleted that allegation, 341 F.Supp. at 10.

In discussing §1971 in his complaint, plaintiff states that, "Although the allegation is juridically *irrelevant*,

Plaintiffs further allege that virtually every member of the class represented by the named plaintiff is a black citizen of the United States and of the State of Texas." (Plaintiff's Complaint at p. 5; emphasis added.) This statement was confirmed by plaintiff's counsel at hearing. The only reasonable construction of plaintiff's contention is that Section 1971 applies to voting procedures which discriminate in a non-racial as well as racial setting. In this regard, the Court judicially notices that the student body at Prairie View is predominantly Negro.

The provision of Section 1971 referred to by plaintiff requires that:

> No person acting under color of law shall–
> (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.

42 U.S.C. §1971(a)(2).

[12] Although this provision is broadly written, to argue that it applies without regard to race ignores the statute as a whole, its legislative history, and prior judicial construction. The Civil Rights Act of 1964 and Section 1971 of the Code clearly aim at eliminating racially motivated practices which restrict exercise of the elective franchise.

Paragraphs (2) and (3) of subsection (a), §1971, were added to the Code by the Civil Rights Act of 1964.

Subsection (a)(1), part of the prior section, provides that all citizens shall be entitled to vote without distinction of race or color. Subsection (a)(2) begins with paragraph (A), quoted above and relied on by plaintiff. Paragraphs (B) and (C) of subdivision (2) forbid the denial of the right to vote because of inconsequential errors or omissions in an applicant's application, registration or other act requisite to voting, and prohibit unevenly apply any literacy test. Thus the introductory provision of the section, while extremely broad, applies specifically and exclusively to situations of racial discrimination. The paragraphs following the provision in question, relate to practices which historically attended efforts to prevent Negroes from voting.

[13, 14] Later subsections of the section relate to enforcement by the Attorney General of the United States. For example, subsection (e) provides that the Court must determine whether any right secured by subsection (a) of which a person may have been deprived, was deprived him because of his race or color. Because it is clear that suits commenced by the Attorney General relate to cases of racial discrimination, it is logical to conclude that the Act as a whole applies only to cases of racial discrimination. The Congress would not have intended a broader application of the Act to individuals suing to enforce their rights than to the Attorney General.

As part of the Civil Rights Act of 1964, the provision must be presumed to relate to the racial situation. That assumption is borne out by the House Report of the Bill, 1964 U.S.Code Cong. & Admin.News, p. 2391, as well as the report cited by plaintiff's brief, Id. at 2490.

Finally, the judicial gloss placed on §1971 by the courts confirms the conclusion that the section is meant to apply

solely to a racial discrimination situation. South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) refers to the section as outlawing "some of the tactics used to disqualify Negroes from voting in federal elections." Id. at 313, 86 S.Ct. at 811. The only case to apply §1971 to a student voting situation is Shivelhood v. Davis, 336 F.Supp. 1111 at 1115 (D.Vt.1971) by another United States District Court. The case is distinguishable on its facts and the opinion omits any analysis of reasons for the court's conclusion. There is no reported precedential authority on the point from the Court of Appeals for the Fifth Circuit.

[15] In summary, the Court concludes that 42 U.S.C. §1971 must be considered inapplicable here.

Despite the statement of juridical irrelevance contained in the last sentence of Paragraph IX of his complaint, plaintiff in a later brief suggests peripherally that *it might* be a case of racial discrimination. (See pp. 16 and 17, Plaintiff's Memorandum Brief, filed October 16). The plaintiff carefully avoids asserting it is a case of racial discrimination; he only says he does not concede it is *not* a racial discrimination case although such statement in brief is contrary to Paragraph IX of his complaint. This suggestion was not predicated on any pleading. However, the Court will review the contention, based on the record in this case as well as in Wilson v. Symm.

As presented by the evidence, defendant Symm generally requires the questionnaire of those applicants whom he does not personally know. Although non-students occasionally receive a questionnaire, this group tends to be students because they are the ones whom Symm does not know. An exception to this generality are those students—

without regard to race—whose parents live in Waller County and thus are already known to defendant. Neither the application form for registration, nor the questionnaire, elicits any statements as to the race of the applicant.

Quite clearly then, it is students and others to whom it may be sent, not Negroes as such, who are required to complete the questionnaire. As evidenced by the named plaintiff and one other identified in the evidence by plaintiff, Caucasian students are subject to the requirement as well as Negro students. And, those Negroes in Waller County who are not students are not required to complete the questionnaire. Thus the differential treatment involved here affects students primarily, a different class from that protected by §1971.

[16] Considering students to be a class and Negroes to be a class, the two classes overlap considerably because Prairie View A & M University is a predominantly Negro institution. This fact is fortuitous however, and does not demonstrate in and of itself, nor inferentially has plaintiff shown by any substantial evidence, the racial bias necessary to support a §1971 claim. This Court found in Wilson v. Symm, 341 F.Supp. at 13, and here confirms that the questionnaire procedure arose out of the problem of determining the residency of students, not from any racial discrimination on the part of Waller County officials. Article 5.21 makes it the duty of the Registrar to inquire into residency of an applicant in a proper case, and the applicable provisions of Article 5.08 [including but not limited to 5.08(k)] furnish him the rules for determining residency.

In summary, because the constitutional issues raised herein are identical to those raised by other members of

this same class and because the statutory claim is without foundation, the Court must refuse to certify this suit as appropriately a class action. F.R.Civ.P. 23(c)(1).

Having disposed of the procedural and class action contentions of plaintiff, I now turn to defendant's contention that this Court should abstain.

3. *The Appropriateness of Abstention*

During the course of these proceedings, four questions have been raised which, if sustained, would justify granting the individual plaintiff the relief sought, specifically, the right to vote in Waller County, Texas, on November 7, 1972.

At one level, plaintiff contends that he is a bona fide resident of Waller County and that defendant's decision to the contrary is factually erroneous. Secondly, it is asserted that defendant's questionnaire is extra-legal, not authorized by statute, and in fact barred by the need for uniformity, the Secretary of State's directive of October 3, and Article 1.03. Next, plaintiff contends the questionnaire violates the federal statutory prohibition, 42 U.S.C. §1971 (1970). Finally, and most strongly, plaintiff argues that the questionnaire and the supporting statute, Article 5.08(k), are in contravention of the Fourteenth Amendment of the United States Constitution. The first two contentions are essentially questions of state law; the last two of federal law.

[17] As previously discussed, the Court holds in favor of the defendant on the federal questions, viewing the Civil Rights Act as inapposite and the state statute and defendant's procedure as constitutionally permissible. But

independently of such holdings, the Court views this case as appropriate for the application of the doctrine of abstention.

Professor Wright discerns four separate principles which justify a federal court's abstaining from decision to allow a state court adjudication. C. Wright, Federal Courts (2nd ed.) §52 (1970). Two of the principles apply here: (a) avoiding a decision of a federal constitutional question where the case may be disposed of questions of state law, and (b) avoiding needless conflict with the administration by a state of its own affairs. Professor Wright discerns these principles but not formulate them; they have been a part of the fabric of the federal jurisprudence on the subject for decades.

The claim of an individual to the right to vote in a particular county can and should be resolved in state court. Article 5.17a(3) of the Texas Election Code provides the state district courts with jurisdiction to hear appeals from a registrar's denial of an application for registration. Such trials are de novo and given priority if an election is pending within 60 days. Obviously a determination by the state court in favor of plaintiff's claim to Waller County residency, would moot the more difficult and uncertain legal issues and avoid a constitutional decision by the federal courts. See, Manard v. Miller, 53 F.R.D. 610 (E.D.Va.), aff'd 405 U.S. 982, 92 S.Ct. 1253, 31 L.Ed.2d 449 (1971). As the Supreme Court held in another context, "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights." Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 349, 71 S.Ct. 762, 768, 95 L.Ed. 1002 (1951).

This Court has on several occasions favored use of carefully established state procedures for resolving controversies without resort to federal court. Press v. Pasadena Independent School District, 326 F.Supp. 550 (S.D.Tex.1971). At the close of the October 30 hearing, the Court expressed the opinion that the State District Court of Waller County, even at that late date, might hear and favorably rule on Ballas' claim to bona fide residency in Waller County. In response, plaintiff's attorneys declined and said it would require as many as 2,500 hearings, referring, of course, to the alleged class, without reference to a single appeal for plaintiff, individually.

Abstention is even more appropriate as to plaintiff's second claim—that defendant's questionnaire is extra-legal and unauthorized by state law. Defendant's use of the questionnaire is based upon his interpretation of Article 5.08(k) and was vindicated by this Court in Wilson v. Symm. As expressed in the October 3 bulletin, the Texas Secretary of State is of the view that any inquiry as to the residency of students is improper. Thus plaintiff's contention not only presents the question of which state official is correct as a matter of constitutional law, but also poses the question of the Secretary's authority to interpret state law. If the Secretary's power to compel uniformity in the application of the election law Article 1.03, extends to providing binding interpretations of the election code, then defendant must yield on the basis of state law.

As discussed above, the Court resolves this conflict in favor of defendant, finding that the Secretary has no authority to issue binding legal interpretations of the statute. Nonetheless, that determination of a state law question is not authoritative and could be rendered invalid by a state court determination to the contrary. Because of

the tentativeness of such decisions, and particularly where, as here, the issue involves questions of a state official's authority, a federal court should abstain from decision. See Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970). Abstention under these circumstances is appropriate even in an election situation. Reed v. Board of Election Commissioners, 459 F.2d 121 (1st Cir. 1972); Harris v. Samuels, 440 F.2d 748 (5th Cir.), cert. denied 404 U.S. 832, 90 S.Ct. 77, 30 L.Ed.2d 62 (1971). Because this second contention applies to the class's claim of the right to vote in Waller County, abstention is also appropriate to the class action claim.

[18, 19] Federal court abstention is warranted as to the class action claim on another ground. The remedy sought by plaintiff, a permanent, mandatory injunction against a state administrative officer, the voter registrar of Waller County, is one of the most severe of a court's judicial actions. Mandamus is appropriate only where the state official has failed to perform a non-discretionary act, or has clearly abused his authority in a discretionary matter. Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959). Mandamus is unavailable where alternative means of obtaining review of the official's action are provided. Manion v. Lockhart, 131 Tex. 175, 114 S.W.2d 216 (1938).

[20] As will be demonstrated in Section 4 of this Memorandum and Order, the voter registration applications of the class were obtained and submitted to defendant Symm by Deputy Registrar Sams in patent violation of the statutes and procedures governing such matters. Because of this, the "qualified voters" referred to in plaintiff's definition of the class are non-existent as far as the record here is concerned. But in addition, defend-

ant's refusal to accept these applications were obviously in accordance with his statutory duty to insure the validity of the voter rolls. Indeed, had he not refused the applications, he would clearly have abused his authority in failing to perform his duties. Under these circumstances, a court must refuse to mandamus the official. Also, because state procedures for review of the rejections are available, mandamus relief is inappropriate. Gonzales v. Stevens, 427 S.W.2d 694 (Tex.Civ.App. – Corpus Christi, 1968, writ ref n. r. e.). In this situation, a federal court must abstain from taking the requested action.

4. *Remedy to be Granted Plaintiff*

[21] For the foregoing reasons, neither plaintiff individually nor the proposed class is entitled to relief under the facts and law as plead and proved by plaintiff. Nevertheless, it has been apparent to the Court during these proceedings that plaintiff's case has been so plead and proved as to concentrate attention toward obtaining relief, not for Mr. Ballas individually, but for the whole class as defined by plaintiff. The complaint, the brief, and the proof presented by plaintiff, all evidence an uncommon interest in the broad constitutional issues, predicated upon the Equal Protection Clause of the Fourteenth Amendment. The thrust for relief extended primarily to the alleged class, with little apparent consideration having been given to plaintiff's more basic and obvious federal constitutional rights under the Due Process Clause, which inhere in him as an individual under the undisputed facts, as plead and proved, but not held in common with the alleged class. Therefore, despite the prior adverse holdings with respect to the constitutional issues expressly raised by plaintiff, it becomes the duty of the Court to consider plaintiff's entitlements if any for relief under the Due Process Clause pursuant to his prayer for general relief.

On October 24, Mr. Ballas testified that after receipt of the letter of rejection from defendant dated October 5, he was dissatisfied and came to Houston to seek legal advice. After inquiry, he employed Mr. Maness. His purpose was to obtain the right to vote in the General Election to be held November 7. He had no part or interest in the late voter registration drive conducted by the Hon. Eristus Sams, Deputy Registrar. In the opinion of the Court, Mr. Ballas came to Houston and his attorney's office, not as part of a crusade to register prospective student voters, or merely to relitigate Wilson v. Symm of which he had no specific knowledge, but out of a sincere desire to vote in Tuesday's election.

Sensing this tension between the basic desire to vote motivating the named plaintiff, and his attorney's apparent zeal for giving priority to the class action, the Court has throughout these proceedings made separate inquiry as to the facts surrounding plaintiff's residency as well as the rejection of plaintiff's application by defendant.

Defendant testified that plaintiff's questionnaire contained a number of blanks and one ambiguous answer, and it was these omissions which resulted in its rejection. This was not an unreasonable position for defendant to take.

In his rejection letter of October 5, defendant also informed plaintiff of his right to appeal to the state district court by reference only to Article 5.17a(3). The letter did not mention a hearing for plaintiff before defendant. There is no evidence that defendant offered or gave plaintiff the hearing required by Article 5.17a(1) which would appear to be a predicate for plaintiff to appeal under Article 5.17a(3).

Article 5.17a(1), Challenge of applicant, provides as follows:

> Any person applying for registration may be challenged by the registrar or deputy taking his application or by any registered voter of the county. *If after hearing* and considering the challenge the officer taking the application is satisfied as to the applicant's entitlement to registration, he shall register the applicant, but if not so satisfied, he shall refuse to register the applicant. (Emphasis supplied.)

[22, 23] The request for the questionnaire to be filled out probably fulfilled the requirement for a challenge by defendant, but certainly not as to the requisite hearing. The obvious defect in defendant's procedure was defendant's failure to afford plaintiff a *hearing* before rejecting his application. By focusing on the rejection and plaintiff's right of appeal to the state district court, defendant implied that such was the only manner in which plaintiff could be heard. Having specified such appeal, it became the duty of defendant also to notify plainiff of his right to a hearing before exercising his right of appeal.

[24] This Court would not consider any relief for plaintiff, if the only question were whether or not defendant complied with Article 5.17a(1) as such. That would be a matter of concern to and for decision at the state level. However, the failure to afford plaintiff such hearing under the facts of this case, constitutes a clear deprivation of plaintiff's right to due process of law under the Fourteenth Amendment to the federal consitution.

The purpose of the statutory requirement for such a hearing is well illustrated by this case. At a hearing before

defendant, missing answers could have been supplied, and ambiguous ones clarified.

At the November 3 hearing, defendant expressed a willingness to provide a hearing even at that late date, but none was requested by plaintiff. In fact, counsel for plaintiff then and there insisted defendant had no authority to conduct such a hearing or issue a registration certificate to plaintiff. However, under the law such willingness of defendant, while commendable, does not cure the defect in his procedure.

In view of the Court's holding on the class action and abstention issues, it becomes important to distinguish plaintiff's rights from those of 1,500 or more individuals, alleged by plaintiff to be a part of the class whose equal protection rights had been violated by defendant's conduct. On October 4, 5 and 6, a voter registration drive was conducted under the sponsorship and leadership of the Hon. Eristus Sams, a voluntary deputy registrar of Waller County. This occurred on the campus of Prairie View A & M University during the closing days of registration. No doubt plaintiff's counsel would contend these individuals were a part of the defined class. However, this Court is of the opinion the facts in the record do not establish them to be a part of the alleged class. Nevertheless, there are important distinctions between the posture of plaintiff and such applicants.

In his testimony, Deputy Sams evidenced a personal interest in the outcome of his voter registration drive. His testimony was to the effect that he conducted the drive in a carnival atmosphere in order to stimulate the attention and interest of students. Large numbers of application forms were indiscriminately passed out to students for

redistribution. The students also collected the completed applications. None of the students were deputy registrars. The record is silent as to the names of the students who assisted Deputy Sams. The record contains no evidence even tending to show whether or not any such student was acting as an agent for any applicant and if so, whether such student was the husband, wife, parent, or child of any such applicant. Deputy Sams testified that he was absent from the campus during most of the drive, but, in effect, that he believed the applications in his possession to have been collected in that drive. This whole procedure contravened Election Code provisions aimed at preventing possible fraud. Articles 45a(1) and (4), Mode of Registration (Supp.1972). Gonzales v. Stevens, 427 S.W.2d 694 (Tex.Civ.App. – Corpus Christi 1968) (writ ref n. r. e.). The provisions of Article 52a (Supp.1972) which authorize and prescribe the duties of deputy registrars do not relieve such officers from the strictures of Articles 45a(1) and (4). In registering voters, deputy registrars are required to follow the same procedure as the registrar but their authority and duties are not as extensive.

The applications now in his possession were taken to the courthouse by Deputy Sams on October 6. There, he had a conference with defendant and the County Attorney. Although Sams had ample time during the drive, he did not prepare the duplicate lists of applicants which was required by law, Guideline 4, Duties of Deputy Registrars, Secretary of State's letter of September 22, 1971. This omission was called to Sams' attention by defendant. When reminded by defendant of his duty to prepare the lists, Deputy Sams left the courthouse with the applications. He failed to furnish such lists by October 7, the last day for registration. The applications were never submitted to defendant in the form required of a deputy registrar.

[25] In view of the foregoing facts, law and state of the record, for the purposes of this proceeding, this Court must treat all of the alleged applications in the possession of Deputy Sams, as being void. Articles 45a(1) and (4); and Gonzales v. Stevens, supra. Thus, the only significant fact of record common to plaintiff Ballas is that he is a student at Prairie View and the alleged applicants whose void applications are in the possession of Deputy Sams are probably students at Prairie View. The only solid evidence of the latter is that Deputy Sams' voter registration drive was conducted on the Prairie View campus and the alleged applications were collected for him from Prairie View students. This is not enough to put the alleged applicants in the same posture of plaintiff, or in the class alleged to be represented by plaintiff.

[26] Because of the shortness of time, the state indisposition of plaintiff's counsel to seek a hearing before defendant through an order of this Court or otherwise, or to proceed in the District Court of Waller County pursuant to Article 5.17a(1), and, the Court being of the opinion that defendant has been and is unaware of the above identified deprivation of plaintiff's federal constitutional right to due process, the Court will grant the individual plaintiff the relief to which he would probably be entitled had one or both of these procedures been followed. The Court is of the opinion that upon a hearing before defendant, or upon appeal to the District Court of Waller County, plaintiff would show himself entitled to a voter registration certificate, and be granted such certificate. The Court will, through the office of a temporary mandatory injunction, order defendant to provide plaintiff Ballas with a voter registration certificate, valid for the election to be held November 7, 1972, only, but void thereafter. If defendant fails to provide such certificate, the Court's

order shall be deemed to constitute such a certificate for the purposes of plaintiff's voting in such election. Further, such order shall enjoin any person from interfering with plaintiff's exercising his right to vote, or voting pursuant thereto, at the voting place designated for the voting precinct in which the campus of Prairie View A & M University is located. The order shall further provide that the case shall remain upon the Court's docket for hearing on permanent injunction and such further orders or relief as may be appropriate or necessary.

And lastly, the Court's action today on the Due Process point is not inconsistent with its action in Wilson v. Symm. In the latter, as reflected by its Memorandum and Order, the Court heard extensive proof from plaintiffs and defendant concerning the residence of each plaintiff. In the alternative, the Court found that each plaintiff had failed to prove that he was a resident of Waller County. The Court judicially notices all of such evidence, as well as its decision, for the purposes of its factual statements here. Due Process was not raised by counsel for plaintiffs. In view of the evidence based upon which the Court made its alternative finding that each plaintiff had failed to establish residence as being in Waller County, there was no occasion for the Due Process issue to be raised by the Court. And furthermore, there was no class action issue in that case, such as has clouded the presentation of plaintiff's rights here. Wilson v. Symm involved only the individual rights of the five plaintiffs.

The foregoing relief will be granted plaintiff Ballas due to the exigencies peculiar to this case and the manifest injustice which would result to plaintiff if it were not granted. The granting of such relief shall not be regarded as precedential for any purpose, or contrary to the concept

of abstention applied to the federal questions sought to be raised by plaintiff's counsel on behalf of plaintiff or the alleged class.

This Supplemental and Amended Memorandum and Order shall constitute the Court's findings of fact and conclusions of law; and shall supersede the Memorandum and Order of the Court filed November 6, 1972, as well as the preliminary statement made from the bench on that date.

DEC 2 3 1973 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-835

T. J. CLARK, ETC., ET AL,
Petitioners,

v.

MARILYN WHATLEY AND CAROL GERBER,
Respondents.

MOTION BY LE ROY E. SYMM, VOTER REGISTRAR OF WALLER COUNTY, TEXAS, FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

LE ROY E. SYMM, as Amicus Curiae, presents this Motion for Leave to File a Brief of Amicus Curiae in Support of Petition for Writ of Certiorari. Although Counsel for Petitioners have consented to the filing of this Brief, Counsel for Respondents have refused to consent to the filing of such Brief.

NATURE OF APPLICANT'S INTEREST

Le Roy E. Symm is Tax Assessor and Collector for Waller County, Texas, and, as such, is by law the voter registrar of Waller County. Symm's duties as voter registrar include determining whether or not an applicant for

a voter registration certificate in Waller County is a resident of Waller County, according to the provisions of Article 5.08 of the Texas Election Code.

The Courts below in the instant case have held unconstitutional the subsection of Article 5.08 dealing with students, that being Article 5.08(k). Prairie View A & M University is located in Waller County, and students at that university have applied to register to vote in Waller County. Symm's method of determining whether such students are residents of Waller County has been attacked in the Courts, and the case of *Ballas* v. *Symm* is now pending in the Court of Appeals for the Fifth Circuit (No. 73-1325 on the docket of such Court). A portion of the argument advanced by Ballas in the Court of Appeals is the same as the holdings of the Courts below in the instant case. The statute declared unconstitutional in the instant case is the same statute involved in *Ballas* v. *Symm*.

QUESTIONS OF LAW RELEVANT TO THE DISPOSITION OF THIS CASE

As a voter registrar in Texas, Symm, if this Motion is granted, will attempt in his Brief to demonstrate to the Court important questions of law involved in this case from his viewpoint as a public official who must apply the law in individualized situations.

These important factors must be emphasized:

(1) Because of the holdings of the Courts below, it is virtually impossible for any voter registrar in Texas to know how to treat a student voter applicant.

In declaring unconstitutional Article 5.08(k) of the Texas Election Code, the Courts below left *undisturbed* the remainder of the Texas statute. Applying the untouched rules concerning residence to student applicants *should*, under the law, result in students having the same residence for

voting purposes as if Article 5.08(k) had not been declared unconstitutional. However, since the Courts below undoubtedly intended their rulings to have some effect, *that effect could only be that students are now being placed in a special, artificial category for determining voter qualifications.* All other voter applicants must be residents of the relevant political subdivision; students, for all practical purposes, need not be.

(2) The opinions of the Courts below give voter registrars no guides as to what rules to follow in considering student voting applications. One of the defendants in the Courts below was a voter registrar. The declaratory judgment of the single-judge District Court (which was affirmed by the Court of Appeals) *did not state* that he was to register students attending college in the county in which he is the registrar. It set no requirements as to what other portions of the Texas law the registrar could or should apply to student applicants. No injunction was granted (nor could have been granted) and no guide was given for future actions to be taken by the registrar in this lawsuit or by Symm or by any other voter registrar.

(3) What has been stated above leads to the third question:

The single-judge District Court did *not* order any voter registrar *to do anything.* The Court simply declared a portion of a statute unconstitutional (without the convening of a three-judge court). The District Court *cannot* enforce its judgment. It could only enforce its judgment by injunction, and it has no authority to issue an injunction to enforce *this* judgment, since to do so would circumvent the three-judge statutory scheme. *The question then is:* If the complaint filed by Respondents upon which the District Court entered its judgment, could only result in a declaratory judgment which cannot be enforced, did the complaint state a cause of action upon which relief could be granted?

All these questions are relevant to the disposition of this case, and to the performance of Symm's statutory duties of office.

WHEREFORE, PREMISES CONSIDERED, Symm prays that this Motion be granted, and Symm be granted leave to file his Brief in Support of Petition for Writ of Certiorari.

Respectfully submitted,

.....

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CERTIFICATE OF SERVICE

I, Will Sears, one of the attorneys for the Amicus Curiae, and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of this Motion have been served on Petitioners by sending three copies thereof to Mr. Sam L. Jones, Jr., Assistant Attorney General for the State of Texas, Post Office Box 12548, Capitol Station, Austin, Texas, 78711, and to Respondents by sending three copies to Mr. David R. Richards, Clinton & Richards, 600 West 7th Street, Austin, Texas, 78701, by placing them in the United States Postal Service with sufficient first class postage attached thereto this ..... day of December, 1973.

.....
Will Sears

SUPREME COURT, U. S.

JAN 10 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-835

MARK WHITE, JR.
Secretary of State of Texas
Petitioner

VS.

MARILYN WHATLEY AND CAROL GERBER ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID R. RICHARDS
600 West 7th Street
Austin, Texas 78701

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court and of the Circuit Court of Appeals of the Fifth Circuit are reproduced in the appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1- Must a state statute, which admittedly segregates and burdens the right to vote of one class of citizens, i.e. students, be supported by a compelling state interest in order to satisfy Constitutional requirements?

2- May a state Constitutionally impose as a condition of voting, a residency test that requires the individual to avow an intent to remain permanently or indefinitely as a resident of the political subdivision?

STATUTE INVOLVED

Article 5.08(k) of the Texas Election Code provides:

> "(k) The residence of a student in a school, college, or university shall be construed to be where his home was before he became such student unless he has become a bona fide resident of the place where he is living while attending school or of some other place. A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student."

STATEMENT OF THE CASE

Declaratory Judgment was granted by the District

Court invalidating a portion of the Texas Election Code which provided in part:

> "A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and make that place his home indefinitely after he ceases to be a student." Article 5.08(k) Texas Election Code.

The cause of action was alleged to arise under the Fourteenth and Twenty-sixth Amendments of the Constitution of the United States and 42 USC Section 1983 and 28 USC Section 1343. Plaintiffs did not seek injunctive relief, asking only for declaratory judgment under 28 USC § 2201.

The Defendant tax assessor of Denton County, relying "only upon the provisions of Article 5.08(k) of the Texas Election Code" instructed all deputy registrars to "refuse registration to any student who indicates an uncertainty about whether he intends to remain in Denton County after graduation." (Responses to Interrogatories, J.A. 21). In keeping with this "uniform policy", the Plaintiff-Green was denied voter registration in Denton County (id. at 21-3).

Green at the time he sought to register was a student at North Texas State University in Denton, lived in Denton in an off-campus apartment and was employed part-time in Denton. (J.A. 47-51) Green testified that he considered himself to be a resident of Denton, because "everything that I am associated with that I care about is in Denton" and that he did not consider himself to be a resident of Dallas where his parents

lived. (J.A. 42) Nevertheless, as found by the trial court, Green was denied the right to register as a voter "solely because (he) was unable to affirm an intent to reside in Denton County indefinitely after he ceases to be a student."

One of the Defendants was Bob Bullock, then Secretary of State of Texas and the State's chief election officer. As found by the circuit court, Bullock testified "unequivocally that Article 5.08(k) created a 'special classification' that served no purpose other than to discourage students from voting." (Pet. for Cert. 10a)

ARGUMENT

The reasons asserted for granting this writ are notable primarily for their insubstantiality.

The first basis is an asserted conflict between two United States District Courts as to the constitutionality of Article 5.08(k). If such a conflict does exist, it will presumably be resolved in the United States Court of Appeals for the Fifth Circuit without the necessity of imposing upon this Court's jurisdiction. There is no suggested conflict among the courts of appeals.

The second ground is an evidentiary complaint concerning the testimony of one of the original Defendants in this proceeding, former Secretary of State Bob Bullock. The bulk of the testimony was admitted without objection, and was clearly probative on the questions at hand. In any event, we do not perceive how this complaint falls within the reach of Rule 19.

The third ground speaks with no greater force. The

overwhelming weight of authority supports the reasoning of the Courts below. *Wilkins v. Bentley*, 189 N.W. 2d 423 (Sup. Ct. Mich., 1971); *Jolicouer v. Mihally*, 488 P. 2d 1 (Sup. Ct. Calif., 1971); *Worden v. Mercer County Board of Elections*, 61 N.J. 325, 294 A.2d 233 (Sup. Ct. N.J., 1972); *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D., N.Y., 1972); *Newburger v. Peterson*, 344 F.Supp. 559 (D. N.H., 1972); *Anderson v. Brown*, 332 F. Supp. 1195 (S.D. Ohio, 1971); *Bright v. Baesler*, 336 F. Supp. 527 (E.D. Ky., 1971); *Johnson v. Darrell*, 337 F. Supp. 138 (S.D. Ind., 1971); *Kennedy v. Meskill* (unreported) (D. Conn., 1971, Civ. No. 14,548); *Phillips v. Beng* (unreported) (E.D. Ill., 1972, Civ. No. 71-234-D).

Assuredly under this Court's analysis in *Dunn v. Blumstein*, 405 U.S. 330 (1972), this statutory restriction on voting residency must serve some compelling State interest. No testimony was offered by the State to justify the burden that the statute admittedly places upon potential student voters. The "purity of the ballot box" argument, which is now made by the State will not survive analysis. For only students are treated as presumptive non-residents by the statute. They are not asked whether they intend to remain indefinitely within the community, rather they are asked to project beyond graduation and avow an intent to remain indefinitely after the conclusion of their schooling. Such a requirement cannot be related to prevention of fraudulent voting, as opined by the Defendant Bullock, it was designed to discourage students from voting.

One of the problems with the State's argument is demonstrated by the plight of Randolph Grayson, one of the Plaintiffs in *Wilson v. Symm*, which the State has chosen to print as part of the supplemental

appendix. Grayson was 29 years old and born in Gulfport, Mississippi. Upon discharge from the Army he came directly to Waller County, Texas where he had lived for four years while attending Prairie View College. Under the authority of the Texas statute, he was denied voter registration in Waller County (Supp. App. 25-26) on the ground that he was not a resident. Texas would apparently say to Mr. Grayson "he does not lose his vote but must vote in his county of his domicile where his parents live" (Pet. for Writ of Cert., p. 8). Under the State's analysis of its statute, Grayson, who had not lived in Gulfport, Mississippi since he entered the Army, remains a voting resident of Mississippi and his four years residence in Texas does not entitle him to vote in this State. A statute that works such an improbable result cannot be justified on some arcane notions of purity of the ballot box.

The vice of the Texas statute may lie in its attempt to employ traditional concepts of domicile as a test of voting residency. The Court below did not reach this question (see fn. 4), however this analysis provides an alternative justification for the Court's holding. For the "indefinite intention" test of domicile simply asks too much of the potential voter. As Circuit Judge Friendly speaking for the three-judge court in *Ramey v. Rockefeller*, 348 F. Supp. 780, 788 (E.D. New York, 1972) viewed it:

> "Against this it is contended that, in these days of an increasingly mobile society, it would be the rare citizen who could swear honestly that he intended to reside at his present address permanently; even if the test of indefinite intention is different, there would undoubtedly be many citizens with 'definite' hopes of moving to better job opportunities, more pleasant climates, and the like. If such a

test were in fact imposed on all citizens, it would go too far in restricting the vote to the more immobile elements of the populace; it would penalize, perhaps irrationally, those who make definite plans, while allowing the drifters who have uncertain plans to vote. And if the test were in fact only applied to students, then it would be an impermissible discrimination against them.

Thus, we think that the only constitutionally permissible test is one which focuses on the individual's present intention and does not require him to pledge allegiance for an indefinite future. The objective is to determine the place which is the center of the individual's life now, the locus of his primary concern." See also *Newburger v. Peterson*, 344 F. Supp. 559 (D. N.H., 1972).

Conclusion

For the foregoing reasons it is respectively submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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